83-1586

CASE NO. _____

IN THE UNITED STATES SUPREME COURT

SPRING TERM

GRINNELL MUTUAL REINSURANCE COMPANY,
AN IOWA CORPORATION,

PETITIONER,

vs.

EMPIRE FIRE & MARINE INSURANCE COMPANY,
A NEBRASKA CORPORATION, ET AL,

RESPONDENTS.

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ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. As long as a truck under permanent ICC lease to an authorized and regulated ICC common carrier, has attached to it and displays an ICC permit number and insignia of the ICC common carrier, and as long as no formal transfer possession of the

truck has been made back to the non-regulated owner, will the regulated ICC motor carrier be completely responsible for the operation of the truck while the ICC lease is in effect, and will the regulated ICC carrier be deemed to have the exclusive possession, control and use of the truck equipment for the duration of the ICC lease?

II. When the regulated ICC carrier is subject to the leasing rules and regulations promulgated by the Interstate Commerce Commission, and when the regulated ICC carrier has entered into lease agreements with the non-regulated truck owner, which release agreements provide that the carrier shall provide and maintain in force for the leased motor vehicle public liability insurance, is the

regulated ICC carrier solely obligated to provide liability insurance coverage covering the leased truck while the ICC lease is in effect?

III. In light of the ICC rules and regulations concerning lease and interchange of vehicles, and when an ICC lease is in effect between the truck owner and the regulated carrier, does an exclusion in the non-regulated truck owner's insurance policy excluding coverage for any automobile while rented to others by the insured, exclude any coverage for the insured vehicle while it is covered by the ICC lease and while the ICC lease regulations are in effect and while the truck still carries the ICC insignia and permit number of the regulated ICC carrier? (In this case, the above insurance

contract was issued to the non-regulated truck owner and not to the regulated ICC carrier.)

IV. Is a policy of insurance issued to insure the garage operations and related service type operations, intended to cover the liability incurred when a truck engaged in interstate commerce transportation operations, and which truck has attached to it the ICC permit and insignia number of the regulated ICC carrier, is involved in a motor vehicle accident causing injury to third-parties?

V. When a truck engaged in interstate commerce operations, and which contains the ICC permit number and insignia number of the regulated ICC carrier, is involved in an accident, is the regulated ICC carrier whose permit and insignia is attached to

the truck at the time, solely responsible for any damage or liabilities arising out of the operation of the truck?

LIST OF ALL PARTIES TO THE PROCEEDING IN THIS COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

1. Grinnell Mutual Reinsurance Company
2. Empire Fire & Marine Insurance Company
3. Matthew Youngren, an infant
4. Michael Youngren, an infant
5. John Youngren
6. Timothy Youngren
7. Sheri Emch
8. Hamel Service Company, Inc., an Illinois corporation
9. Gilbert Culver, a resident of the State of Illinois
10. Excalibur Insurance Company of Minnesota, a Texas Corporation
11. Riechmann Enterprises, Inc., a Missouri corporation

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TABLE OF AUTHORITIES

Cases:

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The official opinion of the Eighth Circuit Court of Appeals which we ask this Court to review is contained at 722 F.2d 1400 (8th Cir. 1983.)

. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. The Judgment of the United States Court of Appeals for th Eighth Circuit for which Petitioner seeks review was dated and entered on the 8th day of December, 1983. This was a new Opinion of the Eighth Circuit Court of Appeals which had vacated an earlier Opinion of the Eighth Circuit Court of Appeals.

2. There was no rehearing sought from the Circuit's new Opinion.

3. There is no cross-petition for Writ of Certiorari involved herein.

4. Pursuant to Section 2101(c) of Title 28 U.S.C.S., this Court has jurisdiction to review a judgment or

decree in a civil action rendered by a court of appeals.

FEDERAL REGULATIONS INVOLVED

The federal regulations which this case involves are contained at 49 U.S.C.S. Section 304; 49 USCS Section 1107, and 49 CFR, Part 1057, concerning lease and interchange of vehicles involved in interstate commerce activities. The pertinent text of these statutes and regulations are set forth in the accompanying appendix.

STATEMENT OF THE CASE

The underlying lawsuit arose out of a three-vehicle accident on July 9, 1979, near Belfield, North Dakota. A tractor-trailer unit owned by Hamel Service Company and driven by one Gilbert Culver, collided with an automobile driven by one Timothy Youngren. A truck driven by one Sheri Emch was also involved. As a result of this collision, one passenger in

the Youngren automobile died and three were injured.

At the time of the accident, the tractor-trailer unit owned by Hamel Service Company was subject to a three-year ICC equipment lease to Riechmann Enterprises, Inc., a regulated interstate commerce motor carrier. The owner of the tractor-trailer unit, namely Hamel Service Company, was not a regulated or authorized interstate commerce carrier or operator. At the time of the accident, the tractor-trailer unit leased to Riechmann Enterprises, the regulated carrier, had displayed on it the ICC permit number and insignia of Riechmann Enterprises, Inc. The truck was empty and was on its way to pick up a load of goods in Baker, Montana for return to the St. Louis, Missouri area. It is also undisputed that at the time of the accident involving the leased motor vehicle, the

leasing regulations promulgated by the Interstate Commerce Commission, and contained in 49 CFR, Part 1057 concerning lease and interchange of vehicles, were in effect. Furthermore, at the time of the accident, formal transfer of the possession of the truck had not been given back to the non-regulated truck owner. Therefore the leasing regulations and requirements concerning the truck were still in effect.

At the time of the accident, the regulated ICC carrier had a policy of liability insurance issued to it by Excalibur Insurance Company of Minnesota. That insurance was issued and delivered to specifically cover the operations of Riechmann Enterprises, the regulated carrier.

At the time of the accident, the truck owner, namely Hamel Service Company, had in effect a policy of garage liability insurance issued by the petitioner. Said

policy of insurance, however, was issued to cover the station operations, including related service garage operations, of Hamel Service Company. The policy was not issued to insure any ICC hauling operations. The policy excluded coverage for an automobile while rented to others by the insured.

A declaratory judgment action was tried in the United States District Court for the District of North Dakota, Southwestern Division, The Honorable Bruce M. Van Sickle presiding. Judge Van Sickle declared that the policy of insurance issued by Excalibur Insurance Company to the regulated carrier Riechmann Enterprises, provided the primary insurance coverage for the operation of the leased semi tractor-trailer unit involved in the accident. The District Court held that any insurance coverage of the petitioner was secondary or excess.

On appeal of that determination to the United States Court of Appeals for the Eighth Circuit, the Eighth Circuit reversed that part of the District Court's judgment and ruled that the garage liability policy issued by the petitioner to the truck owner was the primary insurance coverage and that the insurance policy issued by Excalibur Insurance Company to the regulated ICC carrier was merely secondary or excess. The Eighth Circuit specifically stated that the exclusion in the petitioner's policy for automobiles rented or leased to another did not apply, despite the undisputed fact that at the time of the accident the ICC lease agreement concerning the truck was in effect. The Eighth Circuit noted that although the accident involving the truck occurred during the period of the lease, at the time of the accident the owner (Hamel) had retaken control of the vehicle

and had embarked on a trip for its own benefit, and therefore the lease or rental exclusion would not be effective.

BASIS OF FEDERAL JURISDICTION BELOW

Jurisdiction in the United States District Court was based upon diversity of citizenship of the parties and the requisite amount in controversy, pursuant to 28 U.S.C.A., Sections 1332 and 2201. Jurisdiction in the Court of Appeals, whose judgment review is sought, is founded and based upon 28 U.S.C.A. Section 1291, and Rule 4, Federal Rules of Appellate Procedure, since the appeal to the Appeals Court by petitioner involved an appeal of a final judgment or decision from a district court.

ARGUMENT IN SUPPORT OF ALLOWANCE OF A WRIT

This Court should grant this writ and review the decision of the United States Court of Appeals for the Eighth Circuit for the following reasons:

a. The Eighth Circuit Court of Appeals has rendered a decision in conflict with the decision of other federal courts of appeal in the same matter, and in conflict with a decision of this Court (Transamerican Freight Lines, Inc. v. Brada Miller Freight System, Inc., 423 U.S. 28 (1975). It has also decided this question in conflict with State courts of last resort on the same issue, (see Schedler v. Rowley Interstate Transp. Co., 368 N.E. 2d 128 (Ill. 1977) and Krieder Truck Service, Inc. v. Augustine, 304 N.E. 2d 1179 (Ill. 1979)), and the Eighth Circuit has also decided this case in conflict with one of its earlier decisions on the same issue. See Wellman v. Liberty Mutual Ins. Co., 496 F.2d 131 (8th Cir. 1974) - Re: "Control Issue".

b. The Federal Court of Appeals has decided an important question of federal law, which has not been, but should be

settled by this court, and petitioner believes that the Court of Appeals has decided this important question of federal law improperly and has not followed the express federal Interstate Commerce Commission leasing regulations involved herein, and petitioner seeks final direction from this court on an important question of federal law, concerning the ICC leasing regulations.

Petitioner submits that under the ICC leasing regulations found in 49 CFR 1057, that as long as the leased motor vehicle contains the ICC permit and insignia number of the regulated carrier, and as long as the lease agreement of the vehicle is in effect, then the vehicle, pursuant to the lease and these regulations, should be deemed to be in the exclusive possession and control of the regulated carrier and that that carrier should be obligated to respond in any damages out of

the operation of that truck. However the Eighth Circuit's decision stating that despite the fact that the ICC leases were in effect, and despite the fact that the regulated carrier's ICC permit number and insignia number were on the truck, that because of the factual situation involved, the regulated carrier did not have actual control or possession of the vehicle and that the control and possession was instead in the hands of the owner (petitioner's insured). Petitioner believes that this part of the Eighth Circuit's Opinion is in derogation of the express words and the public policy reasons behind the ICC leasing regulations, and that the regulations were meant to fix responsibility in the regulated carrier whenever the lease regulations were in effect, and that the regulations were imposed to prevent this type of arguing over who actually has

control of the vehicle and to protect this public in that fashion. That the Eighth Circuit's decision herein allows the factual question of actual possession and control to be interjected in a case subject to the ICC leasing rules and regulations, when it was the intent of the Interstate Commerce Commission to avoid such disputes and to fix absolute responsibility and control on the regulated carrier whenever the lease was in effect on the regulated motor vehicle.

Included in the accompanying Appendix are:

(1) Opinion of Eighth Circuit Court of Appeals entered on December 8, 1983;

(2) Memorandum and Order of the United States District Court entered May 5, 1982; Order of the United States District Court dated May 11, 1982; Judgment of the United States District Court dated August 18, 1982

(3) Independent Contractor Transportation Agreement Equipment Lease; BMC980

Endorsement for Motor Carrier Policies of Insurance;

(4) Federal Statutes; ICC Leasing Regulations.

Respectfully submitted this 2nd day of March, 1984.

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APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 82-2047, 82-2108, 82-1918 and 82-1960

No. 82-2047

Grinnell Mutual Reinsurance Company, an Iowa corporation,

Appellee,

v.

Empire Fire & Marine Insurance Company, a Nebraska corporation, et al,

Appellant,

Sheri Emch, resident of the State of North Dakota,

Appellee

Hamel Service Company, Inc., an Illinois corporation, et al,

Appellant.

No. 82-2108

Grinnell Mutual Reinsurance Company, an Iowa corporation,

Appellant,

v.

Empire Fire & Marine Insurance Company, a Nebraska corporation, et al,

Appellees,

Excalibur Insurance Company of Minnesota, a Texas corporation.

No. 82-1918

Matthew Youngren, an infant and Michael Youngren, an infant, by theier Guardian John Youngren and for the heirs of decedent Judith Youngren,

Appellees,

v.

Riechmann Enterprises, a foreign corporation, Gilbert Culver,

Appellees,

Sheri Emch,

Appellant,

Hamel Service Company, Inc., a foreign corporation,

Appellee,

v.

Timothy Youngren,

Appellee.

No. 82-1960

Matthew Youngren, an infant, et al

v.

Riechmann Enterprises, a foreign corporation,

Appellant,

v.

Timothy Youngren,

Appellee.

On Appeals from the United States District Court for the District of North Dakota

On Petition for Rehearing

Submitted: May 16, 1983

Filed: December 8, 1983

Before LAY, Chief Judge, HEANEY, Circuit Judge, and RENNER, United States District Judge.*

LAY, Chief Judge.

Two cases are presented to us on appeal. At the trial of one case, Youngren v. Riechmann Enterprises, No.

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*Robert G. Renner, United States District Judge for the District of Minnesota, sitting by designation.

80-42 (D.N.D. June 28, 1982), the jury determined the comparative liabilities of the drivers of the vehicles involved. The other case, Grinnell Mutual Reinsurance v. Empire Fire & Marine Insurance Co., No. 81-22 (D.N.D. May 5, 1982), was a declaratory action in which the district court decided the relative liabilities of the drivers' employers and insurers. For the purposes of this appeal, we will treat the cases as consolidated as we feel the trial court treated the cases below.

This suit arises out of a three-vehicle accident on July 9, 1979. A tractor-trailer unit owned by Hamel Service Company (Hamel) and driven by its employee Gilbert Culver, collided with an automobile driven by Timothy Youngren. A truck driven by Sheri Emch was also involved. As a result of this collision, one passenger in the Youngren automobile died and three were injured.

In the action to determine the liability of the drivers, the jury found Gilbert Culver 70% at fault for the accident and Sheri Emch 30% at fault. Sheri Emch appeals from this determination of her liability. Emch challenges the trial court's refusal to instruct the jury on the issue of negligent entrustment and the trial court's refusal to submit to the jury whether Culver acted willfully or wantonly. Integrated with her principle arguments are questions of whether the court properly excluded certain evidence.

We have reviewed the record of the jury trial and find no prejudicial error in the court's instructions or rulings on evidentiary issues. We, therefore, affirm the jury's verdict on the comparative fault of Emch at 30% and Culver at 70%.

We now turn to the more complex issue of the coverage and liability of Excalibur, Riechmann, Grinnell, and Hamel.

At the time of the accident, Hamel's tractor-trailer unit was on a three-year lease to Riechmann Enterprises, Inc. (Riechmann), an interstate motor carrier. On the day of the accident, Culver had finished driving a load of steel for Riechmann to Beulah, North Dakota. On arriving in Beulah, Hamel, through Culver, made arrangements to "trip lease"[1] a load for Bee Line Transport originating in Baker, Montana. The profits of this trip were to be divided solely between Hamel and Culver. The accident occurred during the run from Beulah to Baker during which time the truck was empty. Riechmann's Interstate Commerce Commission permit number was displayed on the side of the truck at all

[1] A "trip lease" involves the use by someone other than the lessee of a leased vehicle. Under a trip lease, the non-lessee uses the vehicle for a specific haul of its own. It is common for equipment leases to contain trip lease provisions. This prevents the equipment from standing idle and unproductive when it could otherwise be used.

times concerned.

Hamel and Riechmann had an agreement that Hamel could trip lease the truck when it was not being used by Riechmann. According to testimony at the trial, documents containing the terms of the trip lease would be signed by the driver "on behalf of Riechmann." Unless Riechmann had arranged for the load, Riechmann received no compensation. There is a question whether the parties had agreed that Riechmann's permit was to be displayed during this trip lease. Such a permit number is required to be displayed at all times and Hamel did not have one of its own. Therefore, the use of Riechmann's number was necessary at least until Culver had reached Baker when Bee Line's number, allegedly, could have been placed on the truck. We can thus infer that Hamel's use of Riechmann's permit was

an implied condition of the contract. and unproductive when it could otherwise be used.

At the commencement of the trial on the Youngren claims, Riechmann's insurer, Excalibur Insurance Company of Minnesota (Excalibur), paid a settlement of $250,000 for the wrongful death claim and a total of $50,000 for the three personal injury claims (a subrogation claim of Farmers Insurance Group and the claim of a third passenger in the Youngren car are pending).

The district court held that at the time of the accident, Grinnell Mutual Reinsurance Company (Grinnell) insured Culver and Hamel for the July 9th collision. In an amended order, the court held further that Riechmann was also liable under the ICC regulations regulating long-haul trucking operations. The court then held that Riechmann and

Excalibur were not entitled to recover their costs and expenses from Hamel for defending Culver in the underlying action.

Excalibur, Riechmann, Grinnell, and Hamel each appeal from the district court's order. The essential issues presented on these appeals are: (1) whether the Grinnell garage liability policy issued to Hamel provides coverage for the accident: (2) if so, whether Excalibur or Grinnell provided the primary coverage; and (3) whether Riechmann is entitled to indemnity from Hamel. All parties agree that Illinois law controls.

1. The Grinnell Policy

On March 13, 1975, Hamel applied to Grinnell for a "garage liability" policy. The policy was in effect at the time of the accident. The relevant portion of the policy covers bodily injury or property damage "caused by an occurrence and arising out of garage operations,

including only the automobile hazard for which insurance is afforded as indicated in the schedule." An automobile hazard is defined, inter alia, as "the ownership, maintenance or use of any automobile owned by the named insured while furnished for the use of any person."

Grinnell contends that the phrase "arising out of garage operations" modifies the automobile hazards to which the policy applies; that is, unless an automobile hazard arose out of "garage operations," it is not covered. Although Grinnell's argument has force, this court is bound to follow the substantive law of Illinois in interpreting the insurance contracts. Fidelity Union Trust Company v. Field, 311 U.S. 169 (1940); see Sic Companies of California v. Joint Highway District Number 13, 311 U.S. 180 (1940). In Associated Indemnity Company v. Insurance Company of North America, 68

Ill. App. 3d 807, 386 N.E.2d 529 (1979), the Illinois court was faced with language almost identical to that in the instant case. The court in Associated held that the language referring to injuries arising "out of garage operations, including only the automobile hazard for which insurance is afforded" was ambiguous. Id. at 817-18, 386 N.E.2d at 537. The court observed that the clause could be read either to require that the injury arose out of both operations of a garage and the defined automobile hazard, or to require only that the jury arose out of a defined automobile hazard. The Associated court adopted the latter interpretation because Illinois law holds that an insurance policy's ambiguity is ordinarily to be resolved in favor of coverage. Id.

Grinnell's attempts to distinguish Associated are unpersuasive. We find that under Illinois law the policy language is

ambiguous and, therefore, should be read to cover Hamel for the July 9th accident.[2]

Grinnell argues that the vehicle in question was excluded from the policy at

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[2] As author of this opinion, I would dissent on this point. From a reading of the insurance application of Hamel it is readily apparent that the parties never intended that this garage liability policy provide coverage for long-haul trucking operations. On the application, Hamel described its operations as including sales of gas and cars, repair service, and towing. In a space provided for listing "units owned by named insured and not used primarily in the garage business," Hamel listed no vehicles. Hamel answered "no" when asked on the policy if it owned "any automobiles in any business other than garage-type business."

Also, the existence of other insurance procured by Hamel which potentially covered a situation similar to that involved in the accident leads me to conclude that Hamel was not relying on the Grinnell policy to cover it on its trip lease operations. Hamel had a contract of insurance that is not involved in this appeal with Empire Fire & Marine Insurance Company (Empire). This policy afforded coverage to all vehicles under lease to Riechmann, including the tractor-trailer unit involved in the July 9th collision. The policy covered the tractor when pulling an empty trailer. However, the Empire policy contained an exclusion that limited coverage to a point within a 600 mile radius of Hamel's base of operation and the district court found it did not cover the accident that took place well beyond the 600 mile limit. No appeal has been taken from this ruling.

the time of the accident. The relevant portion of the Grinnell policy reads:

> This insurance does not apply, under the Garage Liability Coverages:
>
> * * *
>
> (e) To bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading, or unloading of any
>
> (2) Automobile
>
> * * *
>
> (ii) While rented to others by the name insured unless to a salesman for use principally in the business of the named insured
>
> . . . .

We agree with the district court's statement that "it is difficult for the Court to believe that the lease contract between Riechmann and Hamel is sufficient to preclude Grinnell's duty to extend coverage to Hamel." Although the accident occurred during the period covered by the lease, at the time of the accident Hamel had retaken control of the vehicle and,

through its agent Culver, had embarked on a trip for its own benefit. Riechmann was in no way to share in the profits of this trip.

The Grinnell policy defines the named insured to include "any person while using, with the permission of the named insured, any automobile to which the insurance applies under the automobile hazard." At the time of the collision, Culver was using the vehicle with the permission of Hamel. Therefore, Culver was included in the coverage of the policy and the policy extended coverage to the July 9th collision.

2. The Relationship Between Grinnell and Excalibur

ICC regulations state that the carrier to whom the equipment is leased must maintain insurance coverage on the leased vehicle for the protection of the public. 49 C.F.R. § 1057.12(k)(1)(1981). The motor carrier whose number is

displayed on the tractor will be held liable to the public for the negligent operation of the leased vehicle. See, e.g., Wellman v. Liberty Mutual Insurance Company, 496 F.2d 131 (8th Cir. 1974); Mellon National Bank & Trust Company v. Sophie Lines, Inc., 289 F.2d 473 (3d Cir. 1961). Therefore, Riechmann was statutorily liable to the public for the negligent acts of Culver while Culver was driving the vehicle displaying Riechmann's permit number. Apparently, acknowledging this liability, Excalibur paid $300,000 in settlement of various claims against Riechmann. Excalibur now argues that, as the primary insurer for the accident, Grinnell must reimburse Excalibur for the settlement amount.

While the ICC regulations do require a motor carrier to maintain public liability insurance and make a carrier liable to the public for negligent acts of

the vehicle's driver whenever the carrier's number is displayed, the regulations do not fix the liability between insured or insurance companies.[3] See Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc., 423 U.S. 28 (1975). In the instant case, Culver was acting as an employee of Hamel at the time of the accident. He was acting within the scope of his duty to Hamel. While he was so acting, Culver was involved in an accident for which he was found to be 70% at fault. Under the common-law theory of respondeat superior, Hamel is liable for the negligence of Culver. See Faltysek v. Kloepfer, 3 Ill. App. 3d 8, 279 N.E. 2d 105 (1971).

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[3]For a detailed discussion of the background and purposes of the ICC regulation of motor carriers' use of motor vehicles not owned by them see Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc., 423 U.S. at 30-38.

This liability is not obviated by the duty to the public that the ICC regulations impose on Riechmann. As the court stated in Carolina Casualty Insurance Company v. Insurance Company of North America, 595 F.,2d 128, 138 n. 31 (3rd Cir. 1979): "Whatever preemptive effect the ICC regulations may have in that limited field [state regulation of motor carriers] cannot form a basis for arguing that federal law also displaces state law doctrines governing master-servant relationships, respondeat superior, contribution among tortfeasors, or even ordinary negligence."

In the instant case, Excalibur paid the settlement based on the liability of Riechmann. The Excalibur policy states that Excalibur agrees "[t]o pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages arising out of the business of the

named insured . . . as a result of "bodily injury or property damage to others. The policy also states: "If there is other insurance . . . against an occurrence covered by this policy, such insurance as is afforded by this policy shall be excess insurance . . . ." The Grinnell policy provides that when "the insured has other insurance which is stated to be applicable to the loss on an excess or contingent basis, the amount of the Company's liability under this policy shall not be reduced by the existence of such other insurance." We find the Excalibur policy is excess insurance under the terms of its policy and therefore Grinnell must be treated as affording the primary coverage. Under the circumstances, Grinnell must reimburse Excalibur for the settlement of the Youngren claims up to the limits of its policy ($100,000 per person up to $300,000 per occurrence). The final

division of liability requires Emch to reimburse Excalibur for 30% of the settlement ($75,000 on the wrongful death claim and $15,000 on the personal injury claims of the Youngren passengers), 30% of the Farmers Insurance Group subrogation claim, and 30% of the pending claim of the third passenger in the Youngren car. According to its policy limits, Grinnell must reimburse Excalibur for $100,000, of the wrongful death claim, the remaining $35,000 on the personal injury claims, 70% of the Farmers claim, and 70% of the pending claim of the third Youngren passenger up to $100,000.

3. Indemnity

Riechmann argues that it is entitled to indemnity from Hamel for the amounts Riechmann paid above the Grinnell limits in settlement of the Youngren claims. Riechmann points to Part III Section 2 of the Hamel-Riechmann lease as establishing

the indemnity provision.[4] Hamel argues that, when read in the context of the policy, this clause affects only damage to commodities.

We agree with Hamel's contention. The purported indemnity clause is in a section headed "Claims," not under the section headed "Insurance." The preceding paragraph in the claims section refers to "loss of, or damage to commodities." We think it is a reasonable rule of construction to assume that the type of claim referred to in the purported indemnity provision was intended to refer to a claim arising from mishandling of cargo by the Contractor (Hamel). We find

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[4] Part III Section 2 of the Hamel-Riechmann lease reads: "The COMPANY and the CONTRACTOR specifically agree: That should any claims arise due to negligence of the CONTRACTOR or his personnel, he shall be fully responsible for his and their negligent and damaging acts and be charged the full amount of said damage."

this provision does not apply in the instant situation.

We also agree with Hamel that it should not be required to reimburse Riechmann on a common law theory of indemnity. In our earlier panel opinion, we placed importance on a provision in the Hamel-Riechmann lease which stated that Riechmann agreed to furnish public liability insurance "when said equipment is being used for transportation of commodities for and in behalf of the Company." Because the trailer was empty and on its way to Baker where it would have been loaded with commodities to be transported on Hamel's behalf, we concluded that Riechmann had no duty to Hamel to furnish public liability insurance at the time of the accident. We concluded that, based on the theory of respondeat superior, Hamel had a duty to indemnity Riechmann. On rehearing, we

conclude that we were in error in so concluding.[5]

Excalibur agreed to insure Riechmann for "damages arising out of" Riechmann's business. Excalibur explicitly acknowledged in the Riechmann policy that "such insurance as is afforded by this policy . . . shall comply with the provisions of [any motor vehicle financial responsibility] law . . . to the extent of the coverage and limits of liability required by such law." As we have discussed above, ICC regulations require that Riechmann maintain insurance coverage for protection of the public whenever Riechmann's permit is being displayed. The Excalibur policy was procured to satisfy this requirement.

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[5] We note as well that Riechmann or Excalibur did not urge common law indemnity before the trial court.

Excalibur provided coverage for any operation in which Riechmann was legally responsible. Riechmann was responsible to the public whenever a vehicle was operating under its ICC permit. It is clear that at all times the lease agreement between Hamel and Riechmann was operative. As part of the lease agreement, Riechmann allowed its permit to be displayed when Hamel was trip leasing. Under these circumstances, we think it only reasonable that Hamel had a right to rely on Riechmann to furnish the public liability insurance that Riechmann was required by law to have.

We emphasize that the lease was at all times in effect and that Riechmann agreed that its permit was to be used during the relevant portion of the trip lease. We also give significance to the evidence that Culver would sign the trip leases "on behalf of Riechmann." Under

the circumstances, Riechmann was a statutory employer and Hamel was also an employer, and as such they stood on equal footing; at the very least, they were joint tortfeasors, and absent contractual agreement no indemnity can be required between them. It would be a windfall for Excalibur for this court to say that Excalibur's coverage applied but that Hamel should reimburse Excalibur for any sums expended.

The judgments of the district court are vacated with direction to modify them in accord with this opinion: judgment on the jury verdict involved in the appeal and cross-appeal in Nos. 82-1918 and 81-1980 is affirmed holding Emch 30% at fault and Culver 70% at fault; in the declaratory action in Nos. 82-2047 and 82-2108 we find Grinnell's garage liability policy applicable as providing primary coverage for the July 9th

accident; to the extent of its policy limits, Grinnell must reimburse Excalibur for sums paid out under the judgments and the settlement of the Youngren claims; Riechmann's policy with Excalibur provides excess coverage for the accident and Excalibur must pay the amounts not covered by the Grinnell policy; finally, we hold Riechmann and Excalibur are denied indemnity from Hamel and are not entitled to reimbursement for the costs of defending Culver in the underlying action.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Grinnell Mutual Reinsurance Company, an Iowa Corporation,

Plaintiff,

vs.

Empire Fire & Marine Insurance Company, a Nebraska Corporation, et al.

Civil Number A1-81-22

MEMORANDUM AND ORDER

The plaintiff, Grinnell Mutual Reinsurance Company, initiated this lawsuit on February 20, 1981 in order to determine the rights and duties of the parties to this lawsuit under insurance contracts. The insurance contracts concern obligations of insurance coverage, defense and indemnification. All of the parties except the plaintiff, defendant Empire Fire and Marine Insurance Company and defendant Excalibur Insurance Company of Minnesota, are parties in a separate

involving a tractor-trailer and an automobile. The collision occurred on U.S. Highway 85 on July 9, 1979 near Belfield, North Dakota. In its complaint, the plaintiff alleges that Empire Fire and Marine Insurance Company (Empire) and Excalibur Insurance Company of Minnesota (Excalibur) had insurance contracts in effect at the time of the collision. The plaintiff also alleges that Hamel Service Company, Inc. (Hamel) is wrongfully contending that a policy of indemnity insurance issued by the plaintiff to Hamel afforded indemnity coverage on the tractor-trailer involved in the collision.

In count two of its complaint, the plaintiff alleges that Riechmann Enterprises, Inc. (Riechmann) is required by law to obtain permits from the Interstate Commerce Commission to engage in interstate commercial hauling of goods. The plaintiff alleges that at the time of the accident, Gilbert Culver (Culver) was

the driver of the tractor-trailer and that Riechmann had complete control over the vehicle and complete responsibility for its operation. The tractor-trailer was owned by Hamel but had been leased to Riechmann. Hamel is engaged in the garage business. This business includes making repairs on trucks and cars, selling tires and leasing tractor-trailers for long distance commercial hauling. Riechmann is engaged in the business of operating leased tractor-trailers for long distance interstate commercial hauling.

The tractor-trailer owned by Hamel but leased to Riechmann and driven by Culver was involved in a collision with an automobile driven by Timothy Youngren. Sheri Emch was the driver of a third vehicle. In a separate lawsuit, it is alleged that Sheri Emch caused the collision by driving in a negligent manner.

The plaintiff, Grinnell Mutual Reinsurance Company (Grinnell) issued its general automobile liability policy numbered 07-00533 to Hamel. The policy term extended from March 28, 1979 to March 28, 1980. The policy contained the following terms and conditions:

> This insurance does not apply:
> (a) to liability assumed by the insured under any contract or agreement except an incidental contract; but this exclusion does not apply to a warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner;

The provision was contained in the Comprehensive General Liability Coverage section of the insurance policy. In that same section Exclusion (b) reads as follows:

> This insurance does not apply:
> (b) to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of
> (1) any automobile or aircraft owned or operated or rented by or rented or loaned to any insured,

Exclusion (e)(2)(ii) reads as follows:

> This insurance does not apply, under the Garage Liability Coverages:
> (e) to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of any
> (2) automobile
> (ii) while rented to others by the named insured unless to a salesman for use principally in the business of the named insured,

Grinnell contends that the policy does not afford indemnity coverage to Hamel or any other defendant. Grinnell has notified Hamel that Grinnel would defend Hamel in the separate civil action (Youngren, et al. v. Riechmann Enterprises, et al. A1-80-42) under a reservation of rights until a judicial declaration of rights was obtained.

Hamel had a contract of insurance in effect on July 9, 1979 with Empire. The contract afforded coverage to all vehicles under lease to Riechmann, including the tractor-trailer involved in the collision.

The policy was numbered BA712445 and provided "Dead Head" and "Bob Tail" long haul coverage for trucking operations. The policy contained an exclusion which limited coverage to a point within a 600 mile radius of operation. Grinnell claims that the exclusion is void as against public policy. Grinnell also claims that Empire is estopped from denying coverage because it was aware that Hamel leased tractor-trailers to Riechmann which travelled beyond the fixed radius of operation. The scene of the collision is well beyond the 600 mile radius of operation.

Riechmann had a contract for indemnity insurance in force with

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1/ "Dead Head" means insurance that covers a tractor pulling a trailer that is empty.

2/ "Bob Tail" means insurance that covers a tractor driven without a trailer.

Excalibur covering the leased tractor-trailer involved in the collision. Excalibur is defending Riechmann and is also defending Culver under a reservation of rights. However, Grinnell alleges that Excalibur wrongfully declined to defend Hamel and wrongfully refused to afford to Hamel indemnity protection under the policy.

All of the insurance contracts were issued by insurance companies who were residing in the State of Illinois. The lease contract between Hamel and Riechmann was completed in Illinois. The tractor-trailer was engaged in interstate commerce at the time of the accident and Interstate Commerce Commission regulations govern the use of vehicles leased to certified interstate carriers. Riechmann complied with the regulations by obtaining the necessary certificates. The lease contract between Hamel and Riechmann was entered into on September 15, 1977 and extended three years from that date to September 15, 1980. The lease contract contained the following provisions:

understood by Lessor (Hamel) and Lessee (Riechmann) that during the term of this lease:

> 1. The said motor vehicle leased hereby shall be under the exclusive and complete possession, use and control of Lessee during the periods the equipment is operated by or for the Lessee." (emphasis added)
>
> ....
>
> "That should any claims arise due to negligence of the contractor or his personnel, he shall be fully responsible for his and their negligent and damaging acts and be charged the full amount of said damage."

At the time of the collision, the tractor-trailer carried the Interstate Commerce Commission permit number issued to Riechmann. Under the lease contract, Culver was on Hamel's payroll; however, when Riechmann wished to use Hamel's tractor-trailer for interstate hauling, Culver would carry out Riechmann's directives. Prior to the July 9, 1979 collision, Culver had hauled a truck load of steel to Beulah, North Dakota for

Riechmann. After unloading, Riechmann allowed Hamel to contract for a return haul where Riechmann did not have one. Thus, Hamel was allowed to solicit return-trip loads. If the haul was arranged by Riechmann, the profits were divided among Culver, Hamel and Riechmann. If the haul was arranged by Hamel, the profits were divided in such a manner that Riechmann received no payment. Prior to the collision, Culver had arranged to haul goods for a carrier known as Bee Line, which had obtained the necessary certificates from the Interstate Commerce Commission. Culver was to travel to Baker, Montana to haul the goods for Bee LIne but had not signed a contract with Bee Line prior to the time of the collision. In the underlying action (A1-80-42) Bee Line obtained a summary judgment on the basis of the undisputed fact that Bee Line had no contact with Culver prior to the collision other than

Culver's notice to haul cargo from Baker, Montana.

Empire submitted its answer to Grinnell's complaint on March 24, 1981. Empire contend that it possesses two affirmative defenses to Grinnell's causes of action. First, a limitation of use endorsement contained in the policy issued by Empire to Hamel provided:

> In consideration of the premium at which this policy is written, it is hereby understood and agreed that no coverage shall be in effect under this policy at any time during which the insured automobile(s) is more than 600 miles from the insured's address as shown on this policy.

Second, another limitation of use endorsement provided as follows:

> It is agreed that the insurance with respect to any automobile described herein or designated in the policy as subject to this endorsement applies, subject to the following additional provisions:
>
> ....
>
> 2. The insurance does not apply:
>
> (b) While the automobile is being used in the business

of any person or organization to whom the automobile is rented.

In a joint answer filed on March 30, 1981, Riechmann and Excalibur deny that Culver weas an agent of Riechmann. Excalibur denies that it has a duty to defend Hamel. Excalibur asserted a cross-claim against Empire and a counterclaim against Grinnell. Both Excalibur and Riechmann assert that the lease contract requires Hamel to assume full responsibility for claims arising under the terms of the contract. They contend that they are entitled to full indemnity from Hamel if they are found to owe any sum in the underlying lawsuit. In its reply and answer, Grinnell denies that it is obligated to provide liability coverage to Hamel and indemnity coverage for any claims by Riechmann against Hamel.

Hamel has asserted a counterclaim against Grinnell and a cross-claim against Empire, Excalibur and Riechmann. Hamel

alleges that it is entitled to liability coverage under its insurance contract with Grinnell and indemnity coverage from Empire despite the endorsement limitation contained in the policy. Coverage allegedly exists because Empire knew that the endorsement would cause insufficient coverage under the circumstances. Therefore, Hamel alleges that the endorsement is void as against public policy and that Empire is estopped to deny coverage. Hamel alleges that Riechmann is under a duty to provide full insurance coverage to Hamel under th provisions of the lease contract. The lease contract provided as follows:

> 3. Lessee shall provide and maintain in force for the motor vehicle leased hereunder the Public Liability insurance; and the Property Damage Insurance required by Section 18-701 of the Illinois Motor Carrier of Property Law.

On March 8 and 9, 1982, a hearing on the declaratory judgment action was held

before this Court. The issue presented to the Court for decision concerns which of the three insurance companies is obligated to provide a defense and insurance coverage as a result of the collision. If a duty to defend exists, to whom is the obligation owed?

Counsel for the parties have stipulated to the following facts for the presentation and resolution of this lawsuit:

(1) On July 9, 1979, an automobile accident took place near Belfield, North Dakota on U.S. Highway #85;

(2) One of the vehicles involved in this three-vehicle accident was a 1974 Ford Tractor, serial number TVU 31922, which was being driven at the time by defendant Gilbert Culver. At the time of the accident, the Ford Tractor was pulling an empty trailer;

(3) The 1974 Ford Tractor driven by defendant Gilbert Culver at the time of the accident was owned by defendant Hamel Service Co., Inc., Hamel, Illinois;

(4) A vehicle driven by defendant

Sheri Emch, and a vehicle driven by defendant Tim Youngren, were also involved in this three-vehicle accident. As a result of the accident, several people were injured and one person was killed;

(5) At the time of the accident on July 9, 1979, an independent Contractor Transportation Agreement dated September 15, 1977, executed by and between Hamel Service Company, Inc. and Riechmann Enterprises, Inc., was in effect covering the 1974 Ford Tractor driven by defendant Culver. This agreement had been executed pursuant to the Interstate Commerce Commission rules and regulations;

(6) At the time of the accident on July 9, 1979, an "Equipment Lease" executed by and between Hamel Service Company, Inc., and Riechmann Truck Service, which lease dated September 15, 1977, was in force and effect covering the 1974 Ford Tractor owned by Hamel and driven by defendant Culver. Said equipment lease was a three-year lease for a term beginning September 15, 1977 and ending September 15, 1980. Said lease was executed pursuant to the Interstate Commerce Commission regulations and the Illinois Commerce Commission regulations;

(7) At the time of the accident, defendant Riechmann Enterprises, Inc., was an authorized Interstate Commerce Commission

carrier. At the time of the accident defendant Hamel had no Interstate Commerce Commission authority to engage in transportation of goods and commodities in interstate commerce by motor carrier;

(8) Prior to the occurrence of the accident, defendant Gilbert Culver had hauled a load of steel in the 1974 Ford Tractor and trailer pursuant to the lease agreements between Hamel and Riechmann, and the ICC authority of defendant Riechmann from St. Louis, Missouri to Beulah, North Dakota;

(9) After unloading the load of steel at Beulah, North Dakota, defendant Gilbert Culver did not have a return load for Riechmann Enterprises and began making arrangements to haul a return load to bring back to the St. Louis, Missouri area. Defendant Culver had made such arrangements with an ICC carrier named Bee Line out of Baker, Montana. At the time of the accident of July 9, 1979 defendant Culver was driving a 1974 Ford Tractor to Baker, Montana to pick up a load for Bee Line which he was going to haul back to the St. Louis area;

(10) Defendant Gilbert Culver never made it to Baker, Montana to pick up the return load for Bee Line, he would have split the freight revenues with Hamel Service Company, and Riechmann

would not have shared in the freight revenues.

(11) At the time of the accident of July 9, 1979, involving the Ford tractor driven by defendant Gilbert Culver, among others, the ICC insignia and permit number of defendant Riechmann Enterprises, Inc. was attached to the door of the Ford Tractor. Furthermore, at the time of the accident, Hamel Service Company had not given a receipt back to Riechmann indicating that possession of the 1974 Ford Tractor had been transferred back to Hamel as of the time of the accident; and,

(12) At the time of the accident, there were three insurance companies who had issued insurance policies to various parties as follows:

(a) Plaintiff Grinnell Mutual Reinsurance Company had issued and had in effect a comprehensive general liability and garage liability policy to defendant Hamel Service Company, Inc.

(b) Defendant Excalibur Insurance Company had issued and had in effect on the day of the accident to defendant Riechmann Enterprises, Inc., a comprehensive business liability and comprehensive physical damage insurance policy. Furthermore, as of

the date of the accident, Excalibur Insurance Company had issued a Form BMC 90 endorsement to its insurance policy to Riechmann Enterprises. The endorsement was issued pursuant to provisions of the Interstate Commerce Act;

(c) On the day of the accident of July 9, 1979, defendant Empire Fire and Marine Insurance Company had issued to and had in effect a basic automobile liability insurance policy, which had been issued to defendant Hamel Service Company, Inc.; and,

(13) Plaintiff Grinnell Mutual Reinsurance Company is defending defendant Hamel Service Company, Inc. under a reservation of rights. Defendant Excalibur Insurance Company is defending defendant Culver under a reservation of rights, and is defending Riechmann Enterprises, Inc. without a reservation of rights. Defendant Empire Fire and Marine Insurance Company is not defending anyone in this action.

At the trial of this action, evidence was presented which concerned the purchase of insurance from Empire for Hamel. Ronald Long is the president of Hamel.

Long's insurance needs were handled by the Wilbur F. Meyer Agency. Prior to the time that the Empire policy was obtained, Long notified Meyer that Long was leasing trucks to Riechmann and needed bobtail and deadhead insurance coverage. He requested that Meyer obtain the necessary insurance. Long did not speak to agents employed by Empire prior to securing the insurance.

Meyer contacted the Nolkemper Agency seeking the necessary insurance coverage. Meyer had received a copy of the lease contract between Hamel and Riechmann. Meyer related to the Nolkemper Agency the information concerning Long's and Hamel's radius of operation. The Nolkemper AGency gave Meyer two separate quotes for insurance coverage: one carried a 800 mile radius limitation on bobtail and deadhead coverage and the second quote carried a 300 mile limitation. Meyer gave a copy of the Empire policy to Hamel; however, Long claims that he did not

receive a copy of the Empire policy. Meyer contacted the Nolkemper Agency and requested that the agency secure the coverage with the 600 mile radius limitation.

Grinnell issued a Garage Liability policy to Hamel in 1975. The policy was issued before Hamel and Riechmann signed the lease contract. Meyer is an agent for Grinnell. Meyer learned of the lease contract when Hamel was involved in an accident in 1978. Meyer notified Long that the Grinnell policy could not furnish liability coverage protection to a Hamel vehicle used under the lease contract. Meyer did secure the necessary coverage with the assistance of the Nolkemper Agency. Long informed Meyer that if an accident occurred while the leased vehicle was operated under Riechmann's ICC permit, Bob Tail and Dead Head insurance would be provided.

The law governing the interpretation of the insurance contracts is the law of Illinois - the site where the contracts were completed and issued. The Court concludes that Empire is not obligated to defend Hamel and no coverage exists under the terms of the Empire policy for the collision which occurred well beyond the 600 mile area emanating from Hamel, Illinois. No ambiguity exists under the terms of the policy which would require that this Court interpret the contract. In addition, Grinnell's contention that the policy was not delivered to Hamel is without merit. The policy was delivered to Meyer. Meyer was not an agent for Empire. The delivery of the policy to Meyer is viewed by this Court as delivery to the agent of Hamel. Meyer's knowledge of Hamel's insurance needs cannot be imputed to Empire. Therefore, this Court concludes that Empire has no obligation to defend any of the parties to this lawsuit

or the underlying lawsuit and no liability may be imposed against Empire.

The remaining issues are more difficult. The first issue is whether Grinnell's Garage Liability Policy insures Hamel, Culver and Riechmann for the claims arising out of the accident. Hamel is a named insured under the policy. As an insured, Hamel is entitled to the benefits of coverage. Grinnell seeks to rely upon rules of construction for insurance contracts to support the proposition that all of the coverages of Automobile Hazard Number one in its policy are subordinate to the language "arising out of garage operations." The Court does not accept this construction. The language is ambiguous. The terms of the Grinnell policy extend coverage beyond mere garage operations. The Court accepts the rule announced in Associated Indem. v. Insurance Co. of North America, 386 N.E. 2d 528 (Ill. 1979). Thus, Grinnell has an

obligation to defend Hamel in the underlying action.

Grinnell argues that exclusion (E)(2)(ii) applies. The exclusion applies when the automobile is rented to others. The Court concludes that the exclusion does not apply in this case. At the time of the accident, Culver was driving the tractor-trailer to Baker, Montana for the benefit of Hamel and Culver. Under this set of facts it is difficult for the Court to believe that the lease contract between Riechmann and Hamel is sufficient to preclude Grinnell's duty to extend coverage to Hamel. At the time of the accident, Culver was driving the tractor-trailer to Baker, Montana for the benefit of Hamel and Culver. Under this set of facts it is difficult for the Court to believe that the lease contract between Riechmann and Hamel is sufficient to preclude Grinnell's duty to extend coverage to Hamel. At the time of the

collision, Hamel's tractor-trailer was empty and the lease contract was not in effect. At the time of the collision, Culver was an agent for Hamel.

Culver is an insured under Grinnell's policy with Hamel. Culver was using the vehicle with Hamel's permission for the joint benefit of Culver and Hamel at the time of the collision. Culver was on Hamel's payroll. If the collision had not occurred, the profits from the trip to Baker, Montana would have been divided between Culver and Hamel. Culver was acting within the scope of his authority at the time of the collision. Because this Court concludes that Culver was Hamel's agent at the time of the collision, Culver is entitled to the benefits contained in the Grinnell policy of insurance with Hamel. Riechmann and Excalibur are entitled to recover from Culver the costs incurred for his defense.

Riechmann is not entitled to the benefits of the policy between Hamel and Grinnell. By virtue of contractual agreement, any lease contract arrangements were outside the coverage in Grinnell's policy with Hamel. Riechmann argues that no lease was in effect at the time of the collision; however, even if Riechmann can avail itself of the benefit that no lease was in effect at the time of the collision, Riechmann cannot be considered an insured under the policy. To accept Riechmann's contention, the Court would have to stretch the language of the policy beyond credulity.

Excalibur contends that Grinnell is obligated to pay the cost of defense for Riechmann in the declaratory judgment action as well as the underlying action. Although Illinois law allows attorneys' fees and costs in situations where one party sues another party in bad faith, there is no evidence to support such an

award in this lawsuit. Riechmann and Excalibur are responsible for their attorneys' fees and expenses. Riechmann's policy with Excalibur insures only Riechmann; there is no omnibus coverage in the policy which extends coverage to any other party in this lawsuit under the facts presented to the Court.

Riechmann and Excalibur claim a right to indemnity from Hamel for any liability Riechmann may incur in the underlying action. The claim is based upon the independent contractor transportation agreement between Hamel and Riechmann. The Court concludes that Riechmann has no right to indemnity from Hamel. The references to indemnity in teh contract do not concern the fact situation presented to the Court. Thus, Hamel has no duty to indemnify Riechmann. Hamel asserts that the contract requires that Riechmann indemnify Hamel because the contract requires Riechmann to furnish public

liability and property damage insurance. The Court does not view this language as sufficient to constitute an agreement for indemnification.

Hamel and Grinnell assert that several facts impose liability upon Riechmann for the collision. AT the time of the accident, the tractor-trailer carried Riechmann's ICC permit and no formal transfer of the tractor-trailer to Hamel had been made. However, the agency relationship between Hamel and Culver could not be clearer. Under such circumstances, Kreider Truck Service, Inc. v. Augustine, 76 Ill.2d 535, 394 N.E.2d 11979 (Sup. Ct. 1979) is inapplicable.

A fact revealed to the parties for the first time at the trial was a second policy Grinnell had in effect at the time of the accident. The policy was issued by Grinnell to Hamel and covered bodily injury liability, property damage liability, collision, and comprehensive

coverage. Under this policy, Grinnell had paid for damage claims resulting from earlier accidents involving Hamel vehicles which had been leased to Riechmann. Grinnell claims that the vehicle involved in the collision near Belfield, North Dakota, a 1974 Ford tractor-trailer, was deleted from the policy schedule. Excalibur and Riechmann argue that Grinnell should be estopped from denying coverage under the policy because Grinnell failed to disclose the existence of the policy in pre-trial discovery. Counsel for Grinnell advised the Court that they were not aware of the policy prior to the trial. The failure to disclose the second policy clearly violates the rules for discovery because the parties have properly sought discovery of the existence and terms of all the insurance contracts involved in the case. However, the remedy of estoppel is not needed here. Liability to defend Hamel and Culver is established

under the Grinnell policy covering garage operations. Because the provisions in the policy are ambiguous and capable of varying interpretations, the interpretation favoring coverage is required by Illinois law.

Therefore, the Court DECLARES AND ORDERS:

1. That Empire is not obligated to provide a defense to any party in the lawsuit nor does coverage exist under the terms of the policy issued by Empire to Hamel for the collision which occurred near Belfield, North Dakota on July 9, 1979;

2. That an ambiguity exists in the policy issued by Grinnell to Hamel which requires that the Court interpret the insurance contract according to Illinois law. Under Illinois law, coverage is extended to Hamel and Culver as Hamel's agent through Grinnell's policy for the collision which occurred near Belfield, North Dakota on July 9, 1979;

3. That Riechmann and Excalibur are entitled to recover their costs and expenses for defending Culver in the lawsuit and the underlying lawsuit;

4. That Grinnell's policy does not extend coverage to Riechmann for the collision which occurred near

Belfield, North Dakota on July 9, 1979;

5. That Riechmann's policy with Excalibur extends coverage only to Riechmann and does not extend coverage to any other party; and,

6. That Riechmann and Excalibur do not have a right to claim indemnity from Hamel and Riechmann has no duty to indemnify Hamel.

Dated this 5th day of May, 1982.

/s/ Bruce M. Van Sickle
BRUCE M. VAN SICKLE, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Grinnell Mutual Reinsurance Company, an Iowa corporation,	)	
Plaintiff,	)	
v.	)	Civil No. A1-82-22
Empire Fire & Marine Insurance Company, a Nebraska corporation, et al.	)	

Defendants.

ORDER

The Order issued by this Court on May 5, 1982 contains an error on page 9 of the memorandum. The error is contained in these sentences:

> "At the time of the accident, the tractor-trailer carried Riechmann's ICC permit and no formal transfer of the tractor-trailer to Hamel had been made. However, the agency relationship between Hamel and Culver could not be clearer."

Although the facts of the lawsuit suggest that Culver is clearly Hamel's agent, existing case law imposes liability on Riechmann Enterprises because Riechmann carried an ICC permit on the tractor that

Culver was driving at the time of the collision. Wellman v. Liberty Mutual Insurance Company, 496 F.2d 131 (8th Circ. 1974). The ICC regulations concerning lease provisions applicable to this lawsuit are valid. Simmons v. King, 478 F. 2d 857 (5th Cir. 1973). It is the carrier rather than the vehicle-furnisher who is regulated. Agricultural Transportation Association of Texas v. King, 349 F.,2d 873 (5th Cir. 1965). Thus, under 49 C.F.R. § 1057.12(d), Riechmann may be a party subject to liability in the underlying lawsuit.

Therefore, IT IS ORDERED

That the ORDER issued by this Court on May 5, 1982 is amended on page 9 of the memorandum. The final paragraph on page 9 is removed and the following paragraph is inserted:

> Hamel and Grinnell assert that several facts impose liability upon Riechmann for the collision. At the time of the accident, the tractor-trailer carried Riechmann's

ICC permit and no formal transfer of the tractor-trailer to Hamel had been made. This fact is sufficient to impose liability upon Riechmann under existing ICC regulations and case law. Thus, Culver is Riechmann's statutory agent and Excalibur must defend Culver. The facts suggest that Culver is an agent in fact for Hamel. Grinnell is secondarily liable.

On page 10 of the memorandum and order, the Court declared the rights of the parties in this lawsuit. Part 3 of the Court's order is amended as follows:

3. That Riechmann and Excalibur are not entitled to recover their costs and expenses for defending Culver in this lawsuit and the underlying lawsuit because Culver is their statutory agent;

Therefore, IT IS ORDERED

That the amendments to the Court's Order of May 5, 1982 referred to above, be incorporated into the MEMORANDUM AND ORDER issued by the Court on May 5, 1982.

Dated this 11th day of May, 1982.

/s/ Bruce M. Van Sickle
Bruce M. Van Sickle, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Grinnell Mutual Reinsurance Company, an Iowa corporation,	)	
Plaintiff,	)	
v.	)	A1-82-22
Empire Fire & Marine Insurance Company, a Nebraska corporation, et al.	)	
Defendants.		

JUDGMENT

This action came on for trial before the Court, Honorable Bruce M. Van Sickle, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered, it is

ORDERED, ADJUDGED AND DECREED that:

1. Empire Fire & Marine Insurance Company is not obligated to provide a defense to any party in this lawsuit, nor does coverage exist under the terms of the policy issued by Empire to Hamel Service Company, Inc., for the collision which

occurred near Belfield, North Dakota, on July 9, 1979;

2. An ambiguity exists in the policy issued by Grinnell Mutual Reinsurance Company to Hamel Service Company, Inc., which requires that the Court interpret the insurance contract according to Illinois law. Under Illinois law, coverage is extended to Hamel Service Company, Inc., and to Gilbert Culver, as Hamel's agent, through Grinnell's policy for the collision which occurred near Belfield, North Dakota, on July 9, 1979;

3. Riechmann Enterprises, Inc., and Excalibur Insurance Company of Minnesota are not entitled to recover their costs and expenses for defending Gilbert Culver in this lawsuit and the underlying lawsuit because Culver is their statutory agent;

4. Grinnell's policy does not extend coverage to Riechmann for the collision which occurred near Belfield, North Dakota, on July 9, 1979;

5. Riechmann's policy with Excalibur extends coverage only to Riechmann and does not extend coverage to any other party; and

6. Riechmann and Excalibur do not have a right to claim indemnity from Hamel, and Riechmann has no duty to indemnify Hamel.

No costs are allowed to any party in this lawsuit.

Bismarck, North Dakota, this 18th day of August, 1982.

/s/ Bruce M. Van Sickle
Bruce M. Van Sickle, Judge

INDEPENDENT CONTRACTOR TRANSPORTATION AGREEMENT

This AGREEMENT, made and entered into this 15th day of September, 1977, by and between RIECHMANN ENTERPRISES, INC., a Missouri corporation, hereinafter referred to as the Company, and Hamel Service Co., Inc. whose address is P. O. Box 128, Hamel, IL 62046 hereinafter referred to as the CONTRACTOR.

WITNESSETH:

WHEREAS the COMPANY is a common carrier by motor vehicle engaged in the transportation of commodities under certificates from the Interstate Commerce Commission, and

WHEREAS the CONTRACTOR is engage, as an independent contractor, in the business of transporting freight by motor vehicle pursuant to contract with private,

contract, or common carriers or shippers, and

WHEREAS the COMPANY desires to enter into an agreement with the CONTRACTOR for the transportation of certain commodities as may be provided by the COMPANY, and the CONTRACTOR desires to contract with the Company to transport such commodities.

NOW, THEREFORE, in consideration of the mutual promises hereinafter contained, the parties have entered into the following covenants:

I. CONTRACTOR'S OFFERS - the COMPANY and the CONTRACTOR specifically agree:

1. The CONTRACTOR hereby agrees to furnish upon the request of the COMPANY the labor to perform all the work necessary for the transportation of such commodities and in such amounts as the COMPANY may provide, and the motor vehicle equipment identified on Appendix "A" attached hereto and hereby made a part hereof, said motor vehicle(s) and motor

vehicle equipment hereinafter referred to as "leased equipment". From time to time, by mutual agreement between the parties hereto, other equipment may be added or substituted for leased equipment identified on Schedule "A" in which event such other equipment shall be covered by the terms and conditions of the lease.

2. That the CONTRACTOR represent and warrants the above described equipment is now in good repair and he will at all times maintain the same in good repair at his own expense. Before commencing operation of said equipment hereunder, CONTRACTOR will submit the equipment to the COMPANY, and the CONTRACTOR will inspect or have the same inspected as required by the rules of the Interstate Commerce Commission with a copy of the inspection report to be retained by the COMPANY: and from time to time as the Interstate Commerce Commission rules

require the CONTRACTOR will have inspections made and the COMPANY will maintain these reports for Interstate Commerce Commission inspection. If the equipment does not comply with federal or state regulations, the same shall not be operated under this contract, and in such event the CONTRACTOR agrees to repair and correct at his cost the defects in order that the equipment may comply with said regulations.

3. That the CONTRACTOR will paint the leased vehicle with such distinctive insignia or other symbols and lettering as may be required by the Company or by federal, state or local government or any agencies, bureaus, and departments thereof, the cost of said painting to be paid by the CONTRACTOR: and upon termination of this agreement, whether by cancellation or expiration of the term thereof, the CONTRACTOR shall forthwith

remove all the COMPANY'S colors, insignia, and advertising from the leased vehicle and all other symbols identifying the CONTRACTOR with the COMPANY in any manner whatsoever, including all permit numbers, both state and federal. Should CONTRACTOR fail to remove said identification, he agrees to pay the COMPANY $100.00 per day beginning the day after the date of cancellation until such date as complete removal of said identification is completed, such monies to apply as liquidating damages and not as a penalty.

4. That when the CONTRACTOR is furnishing the full unit such as trailer, or both tractor and trailer, he will equip the same at his own expense with the necessary equipment for the efficient and safe operation, and safe and efficient handling of the commodities entrusted to his care; not limited to, but including

burlap, tarpaulin, rope, chains, binders, and any and all other equipment necessary.

5. That the CONTRACTOR'S vehicle and equipment shall be operated for the COMPANY in full compliance with all federal, state and local laws, statutes, ordinances, rules and regulations relating to the operation of motor vehicles, including but not limited to contracting or licensing, speed, safety devices and equipment, weight, tonnage, width, height, length, tariff publications, collection of charges, extensions of credit, insurance, wages, and other terms and conditions of employment, unemployment insurance, social security, Federal Highway Use Tax, or any other laws, rules or regulations pertaining to the operations hereunder. That any penalties imposed against the COMPANY on its equipment while in the possession of the CONTRACTOR for

violations of any laws, rules or regulations by the CONTRACTOR or his employees shall be paid by the CONTRACTOR, or charged to his account at the discretion of the COMPANY.

6. The CONTRACTOR agrees to pay all operating and maintenance expenses on the equipment used by it in the performance of this contract, to maintain said equipment in accordance with the specifications and regulations as set forth by the Interstate Commerce Commission or other governmental authorities.

7. The CONTRACTOR agrees to pay all Federal, State, County or Municipal taxes, including fuel tax payments, mileage tax, road tax, equipment use fees on taxes, equipment license fees, driver's license fees, and any other fees and fines that may be assessed on its personnel, equipment or the operation thereof.

8. The CONTRACTOR shall, at its expense, employ all necessary drivers, driver-helpers and laborers who shall be experienced, competent, and qualified to carry out the work to be performed by the CONTRACTOR under this contract. Such employees shall also be qualified under and met all the requirements of applicable Federal and State laws and Municipal ordinances and the rules and regulations of the Interstate Commerce Commission and other regulatory authorities. Such employee drivers, driver-helpers and laborers are understood to be the employees of the CONTRACTOR rather than the COMPANY, and the CONTRACTOR shall be responsible for the withholding and payment of the assessments for taxes, social security, unemployment compensation and workmen's compensation. The CONTRACTOR shall save and hold harmless the COMPANY from any and all liability

required of the COMPANY with respect to himself, or any driver, driver-helper, or employee for employer's liability, or for workmen's compensation benefits.

9. That the motor vehicle or equipment, the subject of this contract, insofar as its commercial or registration plates are concerned shall be licensed by the CONTRACTOR in those states as requested by the COMPANY. If the CONTRACTOR does not license unit in state as requested by the COMPANY, the CONTRACTOR may assume any extra costs that this out of state license may result in. In the event this contract is terminated prior to the time of expiration of any license, registration fees, and taxes for which the Company has either paid or credited the CONTRACTOR'S account or otherwise furnished, the CONTRACTOR will deliver immediately upon request to the General Officer of the COMPANY such

license and registration plates or other identifying insignia, cards or papers and all necessary papers pertaining thereto with any signatures which may be required to effect a transfer thereof or secure a refund from the governmental agencies involved. Should said items be nontransferable the CONTRACTOR will be charged the full amount of the same regardless of the period of time used, and should said items be transferable, the CONTRACTOR shall be charged that portion of the same which he uses. Use shall be to date all items aforesaid properly executed, having been returned to the COMPANY office at Alhambra, Ill. Should CONTRACTOR fail to return the same, the COMPANY may withhold all monies due CONTRACTOR until the CONTRACTOR complies; or if the CONTRACTOR has no funds available, then the CONTRACTOR'S account shall be charged for the same.

10. That the CONTRACTOR will maintain at his own exclusive cost and expense, including but not limited to the preparation and delivery of, driver's logs, reports on hours of service, accidents and any other pertinent information required by the COMPANY, and the CONTRACTOR agrees to pay any fines and penalties resulting from violation thereof. All costs for inspecting the unit both in the COMPANY'S operation and the event that the CONTRACTOR subleases the unit are to be borne by the CONTRACTOR.

11. That should the CONTRACTOR buy a new unit or units, the cost of replacing license plates, state or federal permits, and all other expenses incurred are to be paid by the CONTRACTOR.

II. INSURANCE - The COMPANY and the CONTRACTOR specifically agree:

1. The COMPANY shall furnish Public Liability and Property Damage Insurance

when said equipment is being used for transportation of commodities for and in behalf of the Company, such insurance shall be provided in the limits as in the opinion of the COMPANY may be considered necessary for the coverage and protection of the interest of those concerned, not less however, than required by governmental regulatory bodies having jurisdiction.

2. The COMPANY will furnish Cargo Insurance in such limits as may in the opinion of the COMPANY be considered sufficient for the protection of the interest of those concerned, with a $500.00 deductible provision, which shall be the obligation of the CONTRACTOR to the extent of his proportionate percentage of the revenue of the movement and the remaining percentage shall be the obligation of the COMPANY.

3. The COMPANY in no event assumes any liability of any nature whatsoever to the CONTRACTOR for any loss or damage which the CONTRACTOR may sustain in the operations of his equipment whether such loss may result from fire, theft, collision or other casualty or any other event.

III. CLAIMS - The COMPANY and the CONTRACTOR specifically agree:

1. That the COMPANY may charge to the CONTRACTOR'S account a percentage equal to his proportionate share of the revenue of the movement involving the cost of any or all loss of, or damage to commodities occurring while the same are in the custody, possession or control of the CONTRACTOR, while the remaining percentage of the cost of any or all loss of, or damage to such commodities to be borne by the COMPANY.

2. That should any claims arise due to negligence of the CONTRACTOR or his

personnel, he shall be fully responsible for his and their negligent and damaging acts and be charged the full amount of said damage.

3. It is the duty of the CONTRACTOR to fully and promptly inform the COMPANY in writing at the time of unloading of any claims involving said CONTRACTOR, and failure to do so on the part of the CONTRACTOR grants the COMPANY authority to charge the full amount of said claim to the CONTRACTOR'S account.

4. It is the duty of the CONTRACTOR to report immediately any damage claims, overages or shortages of cargo at the time of loading or unloading. Should he fail to do so, the CONTRACTOR assumes all cost of any claim arising therefrom.

5. The COMPANY reserves the right to withhold as a reserve for claims, any amount sufficient to protect the COMPANY from loss due to shortage, damage or other

losses as may be apparent by notations on delivery receipt or other claim information filed with the COMPANY by a consignee or consignor.

IV. COLLECTION - The COMPANY and the CONTRACTOR specifically agree:

1. That the COMPANY shall collect all charges due for transportation and other services rendered in connection with the transportation of commodities in the leased vehicle as herein provided and that all monies, securities, checks, and other instruments for the payment of transportation services in the leased equipment and accessorial services rendered to shippers shall be deemed trust funds held by him; and the entire amount collected, without any deductions whatsoever, shall be forthwith delivered over to the COMPANY, provided however, that unless directed in writing that delivery be made with collection, the

CONTRACTOR shall have no responsibility in connection therewith. Any losses resulting from thefts, defalcations or failure by the CONTRACTOR or his personnel relative to the return and transmittal of monies collected shall be borne solely by the CONTRACTOR.

2. That all monies sent to the COMPANY are to be mailed by certified or registered mail. At no time will cash or currency be mailed. All monies forwarded must be in the form of Money Order, Certified Check or Bank Draft. If monies are not handled as directed, the CONTRACTOR will be responsible for any shortages or losses. It is understood that this procedure is for the protection of the CONTRACTOR; and therefore, the cost is to be borne by him. All monies and signed delivery papers are to be sent in immediately at time of delivery.

V. ACCIDENTS - The COMPANY and the CONTRACTOR specifically agree:

1. That the CONTRACTOR shall, in case of an accident, notify the COMPANY immediately of said accident so that the COMPANY may assist in obtaining and directing insurance company adjuster and representative to the scene of the accident; the CONTRACTOR shall also give notice to all authorities as provided by law.

VI. RECORDS - The COMPANY and the CONTRACTOR specifically agree:

1. That the CONTRACTOR shall keep and maintain a complete record of all the state permits, miles traveled in each state, state road tax, state gas purchase, and all repairs of CONTRACTOR's equipment., Said records are to be kept and maintained by the CONTRACTOR, his agents and employees and forwarded to the COMPANY as requested. That any record

requested by the COMPANY MUST be forwarded to the office within seven (7) days from the date of such request by the COMPANY in order for the CONTRACTOR to receive full compensation on agreed amounts due the CONTRACTOR for services performed.

2. The COMPANY will furnish bills of lading, inventories, logs and any Interstate Commerce Commission purchased forms that the COMPANY must maintain in the keeping within Interestate Commerce Commission Laws, rules, regulations, directions and requirements.

3. That the COMPANY will furnish to the CONTRACTOR necessary self-addressed mailing envelopes. The cost of the postage will be borne by the COMPANY.

4. That the CONTRACTOR will maintain, prepare and file with the COMPANY all records and reports, bills of lading, and other shipping documents,

regardless of kind, nature and description and to deliver the same at the place and within the time as specified by the COMPANY. Included in such reports will be a manifest covering all shipments and each trip made hereunder.

VII. COMPENSATION - The COMPANY and the CONTRACTOR specifically agree:

1. The COMPANY agrees to pay the CONTRACT a minimum of 65% of the gross revenue, or an agreed amount prior to movement of a shipment as such conditions may give cause, derived by the COMPANY from the full and proper performance of this agreement by the CONTRACTOR.

(a) Payment shall be withheld until proper submission to the COMPANY by mail or delivery of the documents showing complete performance of the contract, including all delivery receipts, bills of lading, copies of the manifest for all work performed, trip sheets, logs and such other evidence of proper delivery of a shipment as may be required by the Interstate Commerce Commission; or by the COMPANY.

(b) The COMPANY, at its option, may deduct from any payment due the

CONTRACTOR hereunder all or any part of any amount for which the CONTRACTOR is then indebted to the COMPANY including but not limited to claims.

(c) The COMPANY agrees to settle with the CONTRACTOR within ten days after the completion of any trip upon the proper submission to the COMPANY and approval by it of all required documents. The COMPANY reserves the right to withhold settlement if the CONTRACTOR has failed to perform all of this contract.

(d) The COMPANY shall not be responsible for the wages and expenses of the CONTRACTOR, its driver, helpers and laborers. The COMPANY shall not be responsible for Workmen's Compensation Insurance covering the CONTRACTOR, its drivers, helpers and laborers. Such matters are the sole and exclusive responsibility of the CONTRACTOR, except to the extent the COMPANY has provided accident cargo insurance.

VIII. CANCELLATION - The COMPANY and the CONTRACTOR specifically agree:

1. That this contract may be terminated by either party without cause upon thirty days' written notice to the other. In the event either party violates any term of this contract, the other party shall have the right to immediately

terminate this contract, provided that the COMPANY may require the CONTRACTOR to complete delivery of any cargo loaded prior to termination. Should the CONTRACTOR fail to do so, the COMPANY shall settle with the CONTRACTOR on the basis of such partial performance as completed under this contract, and charge any expense thereto to the CONTRACTOR.

2. That the CONTRACTOR hereby agrees to notify the COMPANY in writing of the details of all return loads not dispatched out of any COMPANY terminal. Such details shall include the consignor, the consignee, the points of origin, delivery, description of cargo, time of departure, and required or estimated time of delivery. Failure to comply with the requirements of this paragraph shall constitute a material breach of the contract, and the leases shall be automatically terminated thereupon without

notice, and all rights of the CONTRACTOR and benefits hereunder shall be forfeited.

3. This contract constitutes the entire agreement and understanding between the parties and it shall not be modified, altered, changed or amended in any aspect unless in writing and signed by both parties.

4. The parties herein are not the agent of the other and neither party shall have the right to bind the other by contract or otherwise except as herein specifically provided.

5. This contract shall become effective upon the date of execution and shall be binding on the parties and shall remain in full force and effect for one (1) year from date, provided, however, that the contract shall automatically be renewed for a period of one (1) year on each anniversary of the execution hereof, unless eliminated as provided herein.

6. That should any section, sentence, clause or phrase of this contract be for any reason held to be illegal, such determinations of illegality as to such section, sentence, clause or phrase shall not affect the validity or binding force and effect of the remaining portions of this contract.

7. That this agreement supersedes any and all previous agreements between the parties whether written or oral.

8. That this contract is explicit and controlling relative to the liabilities of the CONTRACTOR.

9. That the COMPANY at its option may terminate the CONTRACTOR at any point enroute if the COMPANY deems it in the best interest of the COMPANY to do so. The CONTRACTOR's earnings will then be prorated at that point or place of termination.

10. That the COMPANY may terminate if extra riders are allowed, as there are no provisions for allowing extra riders under the rules and regulations of the Interstate Commerce Commission unless such persons are specifically authorized, qualified, and acting as an employee in conformity with the wage and hour law. The fact that the rider is a relative or spouse has no bearing on the matter.

11. Should the CONTRACTOR breach this contract, he shall be responsible for all costs and liabilities that the COMPANY may be charged with as a result of said breach.

12. All freight transported under this contract shall be billed through the COMPANY, and if the CONTRACTOR at any time that this contract is in force, shall contract for any freight in his own name or any other than the COMPANY, this contract shall be automatically canceled.

IX. GENERAL TERMS AND CONDITIONS - The COMPANY and the CONTRACTOR specifically agree:

1. That the CONTRACTOR, his employees and servants will read and understand the rules and regulations of the Interstate Commerce Commission. He will be held responsible by the COMPANY for these actions as well as being responsible to know that his unit is properly cleared, including but not limited to registration before entering any state.

2. That the COMPANY is in no way responsible for any financial arrangements made between the CONTRACTOR and any agent or other carrier.

3. The COMPANY may charge to the CONTRACTOR's account any and all expenses incurred by the COMPANY for the express benefit of the CONTRACTOR.

4. That this agreement may not be assigned by the CONTRACTOR.

5. That the CONTRACTOR is financially independent and does not expect the COMPANY to finance any part of his operation. If due to conditions beyond the CONTRACTOR's control, his financial status is lowered to the point where he may need financial aid, the COMPANY has the authority without cancelling any provisions of this contract to financially assist him. That 9% simple interest may be charged if the COMPANY finances the CONTRACTOR in any manner.

6. That the COMPANY shall have the right to sublease the truck specified to other carriers and companies, as operation of its business may require.

7. That the parties intend to create by this contract the relationship of COMPANY and Independent Contractor and not an employer-employee relationship. Neither the CONTRACTOR nor its employees are to be considered the employees of the

COMPANY at any time, under any circumstances or for any purposes.

8. That the waiver of any single breach of any terms, conditions or provisions of this contract by either party shall not be deemed a waiver of such term, condition or provision in respect of future breaches or violations.

X. The COMPANY and the CONTRACTOR specifically agree:

1. That this agreement shall be binding upon the COMPANY, its successors and assigns and the CONTRACTOR, his heirs, successors, assigns, guardian or personal representatives.

COMPANY

RIECHMANN ENTERPRISES, INC.

by: /s/ Glen Riechmann

CONTRACTOR

HAMEL SERVICE

by: (signature illegible)

Address of CONTRACTOR

Hamel, IL 62046

s/s Vicki Nicolaides
Witness

APPENDIX "A"

Date: 1-1-78

Unit #	Make	Year	Type of Vehicle	Serial Number	License Number	Year	Number Axles
10B	Ford	1972	Tractor	32316	2947	1978	3
20B	Kenworth	1971	Tractor	12041	2949	1978	3
30B	Mock	1964	Tractor	T-1044	2952	1978	3
42B	Kenworth	1967	Tractor	107697	2953	1978	3
44B	White	1977	Tractor	124164	2954	1978	3
48B	GMC	1970	Tractor	139476	2955	1978	3
56B	Kenworth	1977	Tractor	1533515	2956	1978	3
58B	Kenworth	1966	Tractor	203150	2957	1978	3
60B	Dia. Red	1971	Tractor	585456	2958	1978	3
62B	White	1977	Tractor	002964	2959	1978	3
64B	Ford	1974	Tractor	31922	2960	1978	3

(cont'd.)

Unit #	Make	Year	Type of Vehicle	Serial Number	License Number	Year	Number Axles
68B	White	1977	Tractor	988337	2962	1978	3
70B	White	1977	Tractor	010219	2963	1978	3
72B	White	1968	Tractor	63051	2964	1978	3
76B	White	1974	Tractor	75359	7151	1978	3
78B	White	1971	Tractor	58180	2950	1978	3
80B	White	1978	Tractor	141233	2951	1978	3
82B	White	1977	Tractor	124163	7152	1978	3
86B	White	1970	Tractor	45266	11299	1978	3
88B	Intl.	1974	Tractor	25947	11300	1978	3

First Amended General Order
No. 24
(Revised November 7, 1973)

"EQUIPMENT LEASE"

This Lease Agreement, made and entered into this 15th day of September, 1977 by and between Lessor Hamel Service Company, Inc.(the registered owner of the equipment), Box 128, Hamel, Illinois 62046 and Riechmann Truck Service, R. R. 2, Box 137, Alhambra, Illinois, who is hereinafter called Lessee, and under whose direction, supervision and control said vehicle will be operated pursuant to for-hire motor carrier authority

8028 CR
(Ill. C.C. Identification Number)

For and in consideration of the following compensation 65% of Gross Revenue Weekly (Insert exact amount and manner of payment), Lessor hereby leases

to Lessee the following described motor vehicle

Make: Ford Year: 1974
Type of Vehicle: Tractor
Factory or Serial Number: TVU 31992

for the term of Three years (3)
(not to exceed three years)
Such term beginning on September 15, 1977 and ending September 15, 1980 (SPECIFIC dates must be inserted.)

It is expressly agreed to and understood by Lessor and Lessee that during the term of this lease:

1. the said motor vehicle leased hereby shall be under the exclusive and complete possession; use and control of Lessee during the periods the equipment is operated by or for the Lessee.

2. the said motor vehicle leased hereby shall be used in the service of the Lessee exclusively for the transportation of the following commodities within the following described territory:
Commodities General (except salt and household goods) within a fifty (50) mile radius of Peoria, Illinois, and to transport such property to or from any point outside of such authorized area of operation for

a shipper or shippers within such area. Restriction: There shall be no transportation of commodities in tank type vehicles and all transportation of fertilizer shall be destined for farm sites or points in Madison County, Illinois.

(Commodities to be listed and territory described as in authority of Lessee under The Illinois Motor Carrier of

3. Lessee shall provide and maintain in force for the motor vehicle leased hereunder the Public Liability insurance; and the Property Damage insurance required by Section 18-701 of the Illinois Motor Carrier of Property Law. Property Law).

4. (Insert designation of other duties and obligations of parties, as agreed upon between them).

In Witness Whereof, Lessor and Lessee have executed this Lease agreement in Four (4) (Number of executed copies) the day and year first written above.

Lessor:	Lessee:
signature illegible	/s/ Glen Riechmann
Witness (or Attest):	Witness (or Attest):
signature illegible	signature illegible

BMC-90

ENDORSEMENT FOR MOTOR CARRIER POLICIES OF INSURANCE, OR AUTOMOBILE BODILY INJURY AND PROPERTY DAMAGE LIABILITY UNDER SECTION 215 OF THE INTERSTATE COMMERCE ACT

The policy to which this endorsement is attached is an automobile bodily injury and property damage liability policy and is hereby amended to assure compliance by the insured, as a motor carrier of passengers or property with Section 215 of the Interstate Commerce Act and the pertinent rules and regulations of the Interstate Commerce Commission.

In consideration of the premium stated in the policy to which this endorsement is attached, the Company hereby agrees to pay, within the limits of liability hereinafter provided, any final judgment recovered against the insured for bodily injury to or death of any person, or loss of or damage to property of others (excluding injury to or death of the insured's employees while engaged in the

course of their employment, and property transported by the insured, designated as cargo), resulting from negligence in the operation, maintenance, or use of motor vehicles under certificate of public convenience and necessity or permit issued to the insured by the Interstate Commerce Commission, or otherwise in transportation in interstate or foreign commerce subject to part II of the Interstate Commerce Act, regardless of whether such motor vehicles are specifically described in the policy or not.

The liability of the Company extends to such bodily injuries and deaths and losses and damages whether occurring on the route or in the territory authorized to be served by the insured or elsewhere.

Within the limits of liability hereinafter provided it is further understood and agreed that no condition, provision, stipulation, or limitation

contained in the policy, or any other endorsement thereon or violation thereof, or of this endorsement, by the insured, shall relieve the Company from liability hereunder or from the payment of any such final judgment, irrespective of the financial responsibility or lack thereof or insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which this endorsement is attached are to remain in full force and effect as binding between the insured and the Company, and the insured agrees to reimburse the Company for any payment made by the Company on account of any accident, claim or suit involving a breach of the terms of the policy, and for any payment that the Company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

It is understood and agreed that, upon failure of the Company to pay any final judgment recovered against the insured as provided herein, the judgment creditor may maintain an action in any court of competent jurisdiction against the Company to compel such payment.

The limits of the Company's liability for the amounts provided in this endorsement apply separately to each accident any any payment under the policy because of any one accident shall not operate to reduce the liability of the Company for the payment of final judgments resulting from any other accident.

The Company shall not be liable for amounts in excess of the following for each accident:

SCHEDULE OF LIMITS

Motor Carriers-Bodily Injury Liability-Property Damage Liability

Kind of Equipment	Limit for Bodily injuries to or death of one person	Limit for Bodily Injuries to or death of all persons injured or killed in any one accident (subject to a maximum of $100,000 for bodily injuries to or death of one person	Limit for Loss or damage in any one accident to property of others (Excluding cargo)
Passenger Equipment (seating capacity)			
12 passengers or less	$100,000	$300,000	$50,000
more than 12 passengers	100,000	500,000	50,000
Freight Equipment-All motor vehicles used in the transportation of property	100,000	300,000	50,000

Whenever required by the Commission, the Company agrees to furnish to the Commission a duplicate original of said policy and all endorsements thereon.

All other terms and conditions of the policy remain unchanged.

This Endorsement, effective January 15, 1977(12:01 A.M. Standard Time), forms a part of Policy No. 230025077 issued to Glen R. Riechmann dba Riechmann Truck Service, Inc. by the Excalibur Insurance Company.

/s/ Albert Tufer
Secretary

/s/ Robert D. (illegible)
President

Countersigned by
_____on the 14th day of January, 1977

Endorsement No. A

UNITED STATES CODE ANNOTATED 49 § 304

Ch. 8 Commission - Powers and Duties

Classification of motor carriers

(b) The Commission may from time to time establish such just and reasonable classifications of brokers or of groups of carriers included in the term "common carrier by motor vehicle", or "contract carrier by motor vehicle", as the special nature of the services performed by such carriers or brokers shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this chapter, to be observed by the carriers or brokers so classified or grouped, as the Commission deems necessary or desirable in the public interest.

Investigation of complaints; orders

(c) Upon complaint in writing to the

organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this chapter, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

Application of sections 14 and 16(13) of this title

(d) The provisions of sections 14 an 16(13) of this title, relating to reports, decisions, schedules, contracts, and other

public records, shall apply in the administration of this chapter.

Regulations governing use of vehicles owned by others

(e) Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property--

(1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be

carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment.

Exceptions to regulations for use of vehicles owned by others

(f) Nothing in this chapter shall be construed to authorize the Commission to regulate the duration of any such lease, contract, or other arrangement for the use of any motor vehicle, with driver, or the amount of compensation to be paid for such use--

(1) where the motor vehicle so to be used is that of a farmer or of a cooperative association or a federation of cooperative associations, as specified in section 303(b) (4a) or (5) of this title, or is that of a private carrier of property by motor vehicle as defined in section 303(a)(17) of this title and is used regularly in the transportation of property of a character embraced within section 303(b)(6) of this title or perishable products manufactured from perishable property of a character embraced

within section 303(b)(6) of this title, and such motor vehicle is to be used by the motor carrier in a single movement or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based; or

(2) where the motor vehicle so to be used is one which has completed a movement covered by section 303(b)(6) of this title and such motor vehicle is next to be used by the motor carrier in a loaded movement in any direction, and/or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based.

Feb. 4, 1887, c.104, Pt. II, § 204, as added Aug. 9, 1935, c.498, 49 Stat. 546, and amended June 29, 1938, c. 811, § 4, 52 Sta. 1237; Sept. 18, 1940, c. 722, Title 1, §§ 19,20(a,b), 54 Stat. 921, 922; March 27, 1942, 3 p.m., E.W.T., c. 199, Title I,

§ 101, 56 Stat. 176; Aug. 3, 1956, c. 905, § 2, 70 Stat. 958; Aug. 3, 1956, c. 928, 70 Stat. 983.

Historical Note

References in Text. This Act, referred to in subsec. (a)(4a), means the interstate Commerce Act, which is classified to this chapter and chapters 1, 12, 13 and 19 of this title.

National transportation policy declared in this Act, referred to in subsec. (a)(4a), see note preceding section 301 of this title.

1956 Amendments. Subsec. (a) (3a). Act Aug. 3, 1956, c. 905, added subsec. (a) (3a).

Subsecs. (e) and (f). Act Aug. 3, 1956, c. 928, added subsecs. (e) and (f).

CODE OF FEDERAL REGULATIONS

Rule-making procedures-Federal motor carrier safety regulations, 49 CFR Part 389
Identification of vehicles, 49 CFR Part 1058

CROSS REFERENCES

Motor carrier construed, 49 USCS § 10102

Registration of motor carriers by a state, 49 USCS § 11506

USCS Administrative Rules, ICC, 49 CFR §§ 1100.1 et seq.

INTERPRETIVE NOTES AND DECISIONS

Where leased tractor-trailer was taken to Baltimore for affixing of proper Interstate Commerce Commission plates and inspection, and where lessee held federal permits, and lessor did not, lessor was "employed" within meaning of Maryland venue statute. Davidson Transfer & Storage Co. v. Christian ;(1951) 197 MD 392, 79 A2d 541.

Truck leased by licensed interstate motor carrier from owner having no license to transport goods in interstate commerce cannot be lawfully operated except by those standing in relationship of employer of licensed carrier. Brown v. L. H. Bottoms Truck Lines, Inc. (1947) 227 NC 299, 42 SE2d 71.

§ 11107. Leased motor vehicles

Except as provided in section 11101(c) of this title [49 USCS § 11101(c)], the Interstate Commerce Commission may require a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of his title [49 USCS §§ 10521 et seq.] that uses motor vehicles not owned by it to transport property under an arrangement with another party to--

(1) make the arrangement in writing signed by the parties specifying its duration and the compensation to be paid by the motor carrier;

(2) carry a copy of the arrangement in each motor vehicle to which it applies during the period the arrangement is in effect;

(3) inspect the motor vehicles and obtain liability and cargo insurance on them; and

(4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary of Transportation on safety of operations and equipment, and with other applicable law as if the motor

vehicles were owned by the motor carrier.

(Oct. 17, 1978, P.L. 95-473, § 1, 92 Stat. 1420.)

Federal Register, Vol. 44, No. 16,
Tuesday, January 23, 1979

(Ex Parte No. MC-43(Sub-No. 7)

PART 1057-LEASE AND INTERCHANGE OF VEHICLES

AGENCY: Interstate Commerce Commission

ACTION: Final rules

SUMMARY: The regulations promote full disclosure between the carrier and owner-operator in the leasing contract, promote the stability and economic welfare of the independent trucker segment of the motor carrier industry, and eliminate or reduce the opportunity for skimming and other illegal practices. The existing lease and interchange regulations have been rewritten so as to be simpler and easier to understand.

EFFECTIVE DATE; February 22, 1979

FOR FURTHER INFORMATION CONTACT:

Bruce Kasson (202)275-7723

SUPPLEMENTARY INFORMATION:

By notice of proposed rulemaking published in the FEDERAL REGISTER on November 23, 1977, 42 FR 59984, this proceeding was instituted to revise and rewrite the Commission's leasing regulations in Title 49 of the Code of Federal Regulations, Chapter X, Part 1075--Lease and interchange of Vehicles (49 CFR Part 1057). Because the initial notice did not include formal rules but rather discussed the proposals generally, a second notice consisting of proposed rules was published in the FEDERAL REGISTER on July 11, 1978, 43 FR 29812.

The final rules provide that the cost of various operating expenses such as fuel, permits, tolls, and licenses must be allocated in the lease. The lease must also identify all items that may be charged-back to the lessor, clearly state the insurance costs and responsibilities

of each party, and specify the terms of any equipment purchase plan or rental contract that gives the carrier the right to make deductions from the lessor's compensation. These provisions promote a "truth in leasing concept" and will ensure that the carrier and owner-operator fully disclose the obligations and responsibilities of each party.

Because the rules require that (1) the compensation due the owner-operator be stated on the face of the lease, or in an addendum, and (2) the owner-operator be provided a copy of the freight bill, owner-operators will be able to have an accurate and complete accounting of the monies earned under leasing arrangements. Payment of compensation to lessors within 15days of submission of paperwork, as required by the rules, assures carriers that necessary paperwork will be submitted, and, at the same time, assures

owner-operators that compensation will be timely if the paperwork is submitted.

Provisions have also been added relating to the handling and return of any escrow funds held by the carrier. Interest must be paid on escrow funds, the funds must be returned within 45 days, and the owner-operator must receive a full accounting of escrow fund transactions and deductions.

The rules set forth in Appendix A are adopted under authority of 49 U.S.C. 304(e) and (f), and 5 U.S.C. 552,553, and 559.

Dated January 9, 1979.

By the Commission, Chairman O'Neal, Vice Chairman Brown, Commissioners Stafford, Gresham, Clapp and Christian. Commissioner Stafford would not require the carrier to pay interest on the escrow account § 1057.12(c)(5), and he would delete § 1057.12(j).

H. G. Homme, Jr.
Secretary

Appendix A

Part 1057 is revised and reorganized to read as follows:

Part 1057--Lease and Interchange of Vehicles

Subpart A--General Applicability and Definitions.

Sec.
1057.1 Applicability.
1057.2 Definitions

Supart B--Leasing Regulations

1057.11 General leasing requirements.
1057.12 Written lease requirements

Subpart C--Exemptions for the Leasing Regulations

1057.21 General exemptions.
1057.22 Exemption for trip leasing between authorized carriers
1057.23 Exemption for trip leasing specialized equipment
1057.24 Exemption for trip leasing equipment used in agricultural operations
1057.25 Recordkeeping for agricultural exemption.
1957.26 Exemption from requirement of exclusive possession and control.

Subpart D--Interchange Regulations

1057.31 Interchange of equipment.

Subpart E--Private Carriers and Shippers

1057.41 Rental of equipment to private carriers and shippers.

AUTHORITY: 49 U.S.C. 304(e) and (f) and 5 U.S.C. 552,553, and 559.

Subpart A--General Applicability & Definitions

§ 1057.1 Applicability.

The regulations in this part apply to the following actions by motor carriers holding permanent or temporary operating authority from the Commission to transport property:

(a) The leasing of equipment with which to perform transportation regulated by the Commission.

(b) The leasing of equipment to motor private carriers or shippers.

(c) The interchange of equipment between motor common carriers in the performance of transportation regulated by the Commission.

§ 1057.2 Definitions.

(a) Authorized carrier.- A person or persons authorized to engage in the transportation of property as a common or contract carrier under the provisions of 49 U.S.C. 10921, 10922, 10923, 10931, or 10932.

(b) Equipment.-A motor vehicle, straight truck, tractor, semitrailer, full trailer, any combination of these and any other type of equipment used by authorized carriers in the transportation of property for hire.

(c) Interchange.-The receipt of equipment by one motor common carrier of property from another such carrier, at a point which both carriers are authorized to serve, with which to continue a through movement.

(d) Owner.-A person (1) to whom title to equipment has been issued, or (2) who, without title, has the right to exclusive use of equipment for a period

longer than 30 days, or (3) who has lawful possession of equipment, registered and licensed in any State in the name of that person.

(e) Lease.-A contract or arrangement in which the owner grants the use of equipment, with or without driver, for a specified period to an authorized carrier for use in the regulated transportation of property, in exchange for compensation.

(f) Permanent lease.-A lease in which the authorized carrier acquires the use of equipment, with or without driver, from an owner for a period of 30 days or more.

(g) Trip lease.-A lease in which an authorized carrier acquires the use of equipment, with or without driver, from an owner for a period of time less than 30 days.

(h) Lessor.-In a lease, the party granting the use of equipment, with or without driver, to another.

(i) Lessee.-In a lease, the party acquiring the use of equipment with or without driver, from another.

(j) Sublease.-A written contract in which the lessee grants the use of leased equipment, with or without driver, to another.

(k) Addendum.-A supplement to an existing lease which is not effective until signed by the lessor and lessee.

(l) Private carrier.-A person, other than a motor carrier, transporting property by motor vehicle in interstate or foreign commerce when (1) the person is the owner, lessee, or bailee of the property being transported; and (2) the property is being transported for sale, lease, rent, or bailment, or to further a commercial enterprise.

(m) Shipper.--A person who sends or receives property which is transported in interstate or foreign commerce.

(n) Escrow fund.-Money deposited by the lessor with either a third party or the lessee to guarantee performance, to repay advances, to cover repair expenses, to handle claims, to handle license and State permit costs, and for any other purposes mutually agreed upon by the lessor and lessee.

(o) Detention.-The holding by a consignor or consignee of a trailer, with or without power unit and driver, beyond the free time allocated for the shipment, under circumstances not attributable to the performance of the carrier.

Subpart B--Leasing Regulations

§ 1057.11 General leasing requirements.

Other than through the interchange of equipment as set forth in § 1057.31, and under the exemptions set forth in subpart

C of these regulations, the authorized carrier may perform authorized transportation in equipment it does not own only under the following conditions:

(a) Lease-There shall be a written lease granting the use of the equipment and meeting the requirements contained in § 1057.12.

(b) Receipts for equipment.-Receipts, specifically identifying the equipment to be leased and stating the date and time of day possession is transferred, shall be given as follows:

(1) When possession of the equipment is taken by the authorized carrier, it shall give the owner of the equipment a receipt.

(2) When possession of the equipment by the authorized carrier ends, it shall obtain a receipt from the owner.

(3) Authorized representatives of the carrier and the owner may take possession

of leased equipment and give and receive the receipts required under this subsection.

(c) Identification of equipment.-The authorized carrier acquiring the use of equipment under this section shall identify the equipment as being in its service as follows:

(1) During the period of the lease, the carrier shall identify the equipment in accordance with the Commission's requirements in Part 1058 of this chapter (Identification of Vehicles). Upon termination of the lease, the authorized carrier shall remove all identification showing it as the operating carrier before giving up possession of the equipment.

(2) Unless a copy of the lease is carried on the equipment, the authorized carrier shall keep a statement with the equipment during the period of the lease certifying that the equipment is being

operated by it. The statement shall also specify the name of the owner, the date and length of the lease, any restrictions in the lease relative to the commodities to be transported, and the address at which the original lease is kept by the authorized carrier. This statement shall be prepared by the authorized carrier or its authorized representative.

(d) Records of equipment.-The authorized carrier using equipment leased under this section shall keep records of the equipment as follows:

(1) If the equipment is being leased for periods of less than 30 days, the authorized carrier shall prepare and keep documents covering each trip for which the equipment is used in its service. These documents shall contain the name and address of the owner of the equipment, the point of origin, the time and date of departure, and the point of final

destination. Also, the authorized carrier shall carry papers with the leased equipment during its operation containing this information and identifying the lading and clearly indicating that the transportation is under its responsibility. These papers shall be preserved by the authorized carrier as part of its transportation records. Trip leases which contain the information required by the provisions in this paragraph may be used and retained instead of such documents or papers.

(2) If the equipment is being leased for periods of 30 days or more, the authorized carrier shall comply with the provisions of paragraphs (d)(1) of this section, but it may keep the required information at its terminals or principal office as part of its records rather than with the leased equipment.

§ 1057.12 Written lease requirements.

Except as provided in the exemptions set forth in Subpart C of these regulations, the written lease required under § 1057.11(a) shall contain the following provisions:

(a) Parties.-The lease shall be made between the authorized carrier and the owner of the equipment. The lease shall be signed by these parties or by their authorized representatives.

(b) Duration to be specific. The lease shall specify the time and date or the circumstances on which the lease begins and ends. These times of circumstances shall coincide with the times for the giving of receipts required by § 1057.11(b)).

(c) Minimum duration of 30 days when operated by owner.-The period for which the lease applies shall be for 30 days or more when the equipment is to be operated

for the authorized carrier by the owner or an employee of the owner.

(d) Exclusive possession and responsibilities.-The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

(e) Compensation to be specified.-The amount to be paid by the authorized carrier for equipment and driver's services shall be clearly stated on the face of the lease or in an addendum which is attached to the lease. Such lease or addendum shall be delivered to the lessor prior to the commencement of any trip in the service of the authorized carrier. An authorized representative of the lessor

may accept these documents. The amount to be paid may be expressed as a percentage of gross revenue, a flat rate per mile, a variable rate depending on the direction traveled or the type of commodity transported, of by any other method of compensation mutually agreed upon by the parties to the lease. The compensation stated on the lease or in the attached addendum may apply to equipment and driver's services either separately or as a combined amount.

(f) Items specified in lease.-The lease shall clearly specify the responsibility of each party with respect to the cost of fuel, fuel taxes, empty mileage, permits of all types, tolls, ferries, detention and accessorial services, base plates and licenses, and any unused portions of such items.

(g) Payment period.-The lease shall specify that payment to the lessor under

permanent or trip lease to the authorized carrier shall be made within 15 days after submission of the necessary delivery documents and other paperwork concerning a trip in the service of the authorized carrier. The lease shall clearly specify the delivery documents and other paperwork that must be submitted before the lessor can receive payment.

(h) Copies of freight bill.-Subject to the right of the authorized carrier to delete the names of shippers and consignees shown on the freight bill, the lease shall specify that the authorized carrier shall give a copy of the rated freight bill before or at the time of settlement to those lessors whose revenue is based on a percentage of the gross revenue for a shipment. The lease shall clearly specify the right of the lessor, regardless of method of compensation, to examine copies of the carrier's tariff.

(i) Charge-back items.-The lease shall clearly specify all items that may be initially paid for by the authorized carrier, but ultimately deducted from the lessor's compensation at time of payment or settlement.

(j) Products, equipment, or services from authorized carrier. The lease shall specify that the lessor is not required to purchase or rent any products, equipment, or services from the authorized carrier as a condition of entering into the lease arrangement. The lease shall specify the terms of any agreement in which the lessor is a party to an equipment purchase or rental contract which gives the authorized carrier the right to make deductions from the lessor's compensation for purchase or rental payments.

(k) Insurance-(1) The lease shall clearly specify the legal obligation of the authorized carrier to maintain

insurance coverage for the protection of the public pursuant to Commission regulations under 49 U.S.C. 10927. The lease shall further specify who is responsible for providing any other insurance coverage for the operation of the leased equipment, such as bobtail insurance. If the authorized carrier will make a charge back to the lessor for any of this insurance, the lease shall specify the amount which will be charged back to the lessor.

(2) If the lessor purchases any insurance coverage for the operation of the leased equipment from or through the authorized carrier, the lease shall specify that the authorized carrier will provide the lessor with a copy of each policy upon the request of the lessor. Also, where the lessor purchases such insurance in this manner, the lease shall specify that the authorized carrier will

provide the lessor with a certificate of insurance for each such policy. Each certificate of insurance shall include the name of the insurer, the policy number, the effective dates of the policy, the amounts and types of coverage, the cost to the lessor for each type of coverage, and the deductible amount for each type of coverage for which the lessor may be liable.

(3) The lease shall clearly specify the conditions under which deductions for cargo or property damage may be made from the lessor's settlements. The lease shall further specify that the authorized carrier must provide the lessor with a written explanation and itemization of any deductions for cargo or property damage made from any compensation of money owed to the lessor. The written explanation and itemization must be delivered to the lessor before any deductions are made.

(l) Escrow funds.-If escrow funds are required, the lease shall specify:

(1) The amount of any escrow fund or performance bond required to be paid by the lessor to the authorized carrier or to a third party.

(2) The specific items to which the escrow fund can be applied.

(3) That while the escrow fund is under the control of the authorized carrier, the authorized carrier shall provide an accounting to the lessor of any transactions involving such fund. The carrier shall perform this accounting in one of the following ways:

(i) By clearly indicating in individual settlement sheets the amount and description of any deduction or addition made to the escrow fund; or

(ii) By providing a separate accounting to the lessor of any transactions involving the escrow fund.

This separate accounting shall be done on a monthly basis.

(4) The right of the lessor to demand to have an accounting for transactions involving the escrow fund at any time.

(5) That while the escrow fund is under the control of the carrier, the carrier shall pay interest on the escrow fund on at least a quarterly basis. For purposes of calculating the balance of the escrow fund on which interest must be paid, the carrier may deduct a sum equal to the average advance made to the individual lessor during the period of time for which interest is paid. The interest rate shall be established on the date the interest period begins and shall be at least equal to the average yield or equivalent coupon issue yield on 91-day, 13 week Treasury bills as established in the weekly auction by the Department of Treasury.

(6) The conditions the lessor must fulfill in order to have the escrow fund returned. At the time of the return of the escrow fund, the authorized carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in the lease, and shall provide a final accounting to the lessor of all such final deductions made to the escrow fund. The lease shall further specify that in no event shall the escrow fund by returned later than 45 days from the date of termination.

(m) Copies of the lease.-An original and two copies of each lease shall be signed by the parties. The authorized carrier shall keep the original and shall place a copy of the lease on the equipment during the period of the lease unless a statement as provided for in § 1057.11(c)(2) is carried on the equipment instead. The

owner of the equipment shall keep the other copy of the lease.

Subpart C--Exemptions for the Leasing Regulations

§ 1057.21 General exemptions.

Except for § 1057.11(c) which requires the identification of equipment, the leasing regulations in this part shall not apply to:

(a) Equipment used in substituted motor-for-rail transportation of railroad freight moving between points that are railroad stations and on railroad billing.

(b) Equipment used in transportation performed exclusively within any commercial zone as defined by the Commission.

(c) Equipment leased without drivers from a person who is principally engaged in such a business.

(d) Any type of trailer not drawn by a power unit leased from the same lessor.

§ 1057.22 Exemption for trip leasing between authorized carriers.

Regardless of the leasing regulations set forth in this part, an authorized carrier may lease equipment to or from another authorized carrier under the following conditions:

(a) The identification of equipment requirements in § 1057.11(c) must be complied with

(b) The lessor must own the equipment or hold it under a lease of 30 days or more.

(c) The lessor must regularly use the equipment in the service it is authorized by the Commission to perform.

(d) The equipment must be leased for transportation in the direction of a point which the lessor is authorized to serve.

(e) There must by a written agreement between the authorized carriers concerning the equipment as follows:

(1) It must be signed by the parties of their authorized representatives.

(2) It must provide that control and responsibility for the operation of the equipment shall be that of the lessee from the time possession is taken by the lessee and the receipt required under § 1057.11(b) is given to the lessor until:

(i) Possession of the equipment is returned to the lessor and the receipt required required under § 1057.11(b) is received by the authorized carrier; or

(ii) Possession of the equipment is returned to the lessor or given to another authorized carrier in an interchange of equipment.

(3) A copy of the agreement must be carried in the equipment while it is in the possession of the lessee.

§ 1057.23 Exemption for trip leasing specialized equipment.

The requirement in § 1057.12(c)

concerning the minimum duration of a lease for equipment with driver, does not apply where:

(a) The equipment is owned by an authorized automobile carrier and is leased or subleased to another authorized automobile carrier for use in transporting motor vehicles.

(b) The equipment is owned by an authorized tank truck carrier and is leased or subleased to another authorized tank truck carrier for use in transporting commodities in bulk.

(c) The equipment is dump equipment leased or subleased for use in transporting salt and calcium chloride, in bulk, for ice and snow control purposes during the period from November 1 through April 30 of each year.

§ 1057.14 Exemption for trip leasing equipment used in agricultural operations.

The requirement in § 1057.12(c) concerning the minimum duration of a lease

for equipment with driver, does not apply where the authorized carrier complies with the provisions of § 1057.25 and where:

(a) A farmer or a cooperative association or federation of cooperative associations under 49 U.S.C. 10516(a)(4) or (5).

(b) A private carrier and the equipment is used regularly in the transportation of (1) property referred to in 49 U.S.C. 10516(a)(6), or (2) perishable products manufactured from perishable property referred to in that section.

(c) The equipment has completed a movement covered by 49 U.S.C. 10516(a)(6), and is leased to the authorized carrier for use next in one of the following:

(1) A loaded movement in any direction.

(2) One or more of a series of movements, loaded or empty, in the general

direction of the place where the equipment is based.

(3) A movement described in paragraph (1) of this section and than a movement described in paragraph (2) of this section.

§ 1057.25 Recordkeeping for agricultural exemption.

To qualify for the exemption in § 1057.24, prior to leasing the equipment, the authorized carrier shall receive and retain a statement signed by the owner, or authorized representative of the owner, which includes:

(a) Authorization for the driver to lease the equipment for such movements.

(b) Certification that the equipment meets the qualifications in paragraph (a) or (b) of § 1057.24.

(c) Specification of the original, destination, and the time of beginning and ending of the last movement which brought

the equipment within the exemption of § 1057.24.

§ 1057.26 Exemption from requirement of exclusive possession and control.

The requirements in § 1057.12(d) concerning exclusive possession and control of leased equipment by the authorized carrier lessee do not apply where:

(a) The parties provide in the lease that the authorized carrier lessee be considered the owner of the equipment for the purpose of subleasing the equipment to other authorized carriers under the regulations in this part during the length of the lease.

(b) An authorized carrier of household goods has leased equipment for the transportation of household goods, as defined by the Commission, and the equipment is not being operated by or for the authorized carrier lessee at that time.

Subpart D--Interchange Regulations

§ 1057.31 Interchange of equipment

Authorized common carriers may interchange equipment under the following conditions:

(a) Interchange agreement.-There shall be a written contract, lease or other arrangement providing for the interchange and specifically describing the equipment to be interchanged. This written agreement shall set forth the specific points of interchange, how the equipment is to be used, and the compensation for such use. The interchange agreement shall be signed by the parties or by their authorized representatives.

(b) Operating authority.-The carriers participating in the interchange shall hold certificates of public convenience and necessity which authorize the

transportation of the commodities at the point where the physical exchange occurs.

(c) Through bills of lading.-The traffic transported in interchange service must move on through bills of lading issued by the originating carrier. The rates charged and the revenues collected must be accounted for in the same manner as if there had been no interchange. Charges for the use of the interchanged equipment shall be kept separate from divisions of the joint rates or the proportions of such rates accruing to the carriers by the application of local or proportional rates.

(d) Identification of equipment.-The authorized common carrier receiving the equipment shall identify equipment operated by it in interchange service as follows:

(1) The authorized common carrier shall identify power units in accordance

with the Commission's requirements in Part 1058 of this chapter (Identification of Vehicles). Before giving up possession of the equipment, the carrier shall remove all identification showing it as the operating carrier.

(2) Unless a copy of the interchange agreement is carried on the equipment, the authorized common carrier shall carry a statement with each vehicle during interchange service certifying that it is operating the equipment. The statement shall also identify the equipment by company or State registration number and shall show the specific point of interchange, the date and time it assumes responsibility for the equipment, and the use to be made of the equipment. This statement shall be signed by the parties to the interchange agreement or their authorized representatives. The requirements of this paragraph shall not

apply where the equipment to be operated in interchange service consists only of trailers or semitrailers.

(e) Connecting carriers considered as owner.-An authorized carrier receiving equipment in connection with a through movement shall be considered to the owner of the equipment for the purpose of leasing the equipment to other authorized carriers in furtherance of the movement to destination for the return of the equipment after the movement is completed.

Subpart E--Private Carriers and Shippers

§ 1057.41 Rental of equipment to private carriers and shippers

Authorized carriers may rent equipment to private carriers and shippers only as follows:

(a) Authorized carriers may rent equipment, with or without drivers, to private carriers or shippers where the vehicles are to be sued for transportation

which is exempt under 49 U.S.C. 10526(a)(7) or (b)(1).

(b) Authorized carriers may rent equipment with drivers to private carriers or shippers where their operating authorities specifically allow such service.

(c) Authorized carriers may rent equipment without drivers to private carriers or shippers where the authorized carriers are transporting property wholly for and on the billing of railroads.

(d) Authorized contract carriers may rent equipment without drivers to private carriers and shippers where approval of the rental contracts has been obtained from the Commission.

[FR Doc. 79-2304 Filed 1-22-79; 8:45 a.m.]

83 - 1586

CASE NO. ———

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APR 11 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

SPRING TERM

Grinnell Mutual Reinsurance Company, an Iowa Corporation,

Petitioner,

vs.

Empire Fire & Marine Insurance Company, a Nebraska Corporation, et al,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS EXCALIBUR INSURANCE COMPANY OF MINNESOTA AND RIECHMANN ENTERPRISES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS FOR REVIEW

1. Did the Eighth Circuit correctly apply Illinois insurance law in determining that petitioner Grinnell Mutual Reinsurance Company (Grinnell) extended coverage to Hamel Service Company (Hamel) and Gilbert Culver (Culver) for the motor vehicle accident of July 9, 1979?

Respondent submits this must be answered in the affirmative.

2. Was the Eighth Circuit's determination that the common law liabilities of a negligent tortfeasor-employee and his employer are not eliminated by imposition of a vicarious liability upon an ICC licensed lessor correct?

Respondent submits this must be answered in the affirmative.

RULE 28(1) - LISTING OF ALL PARENT COMPANIES, ETC.

1. Exclaibur Insurance Company of MN

   a. Parent Company - Excalibur Holdings, Inc., Nevada

   b. No Subsidiaries and Affiliates

2. Riechmann Enterprises

   a. No Parent Company, Subsidiaries or Affiliates

B. LIST OF PARTIES

Respondent adopts petitioner's list of parties.

C. TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

SPRING TERM

CASE NO. ———

Grinnell Mutual Reinsurance Company, an Iowa Corporation,

Petitioner,

vs.

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D. CITATION OF OPINION AND JUDGMENTS DELIVERED BELOW

Respondent adopts petitioner's citation.

E. STATEMENT OF JURISDICTION

Respondent adopts petitioner's statement of jurisdiction.

F. FEDERAL REGULATIONS INVOLVED

Respondent adopts petitioner's statement of federal regulations involved.

G. STATEMENT OF THE CASE

This is a declaratory judgment action to determine which insurers should respond to defend and indemnify various defendants in suits for bodily injury damages resulting from a motor vehicle accident occurring on July 9, 1979, near Belfield, North Dakota. A tractor-trailer owned by Hamel and driven by its employee, Culver, collided with an automobile driven by Timothy Youngren. A third vehicle driven by Sheri Emch was also involved. The separate liability trial determined that Culver was 70 percent responsible and Emch, 30 percent, under North Dakota's comparative negligence law. That finding was affirmed by the Eighth Circuit and is not before this Court.

The Hamel truck with Culver as its driver had been leased to Riechmann Enterprises, Inc. (Riechmann) an Illinois based ICC licensed carrier, previous to the accident. The leased equipment and driver were used by Riechmann to transport cargo under its ICC permit. Culver had delivered a Riechmann dispatched load to Beulah, North Dakota, but Riechmann had no return cargo for Culver. Rather than return empty, Culver, acting on behalf of Hamel, engaged a "trip lease" through another carrier. Culver was enroute to Montana from Beulah, North Dakota, to pick up the cargo for the trip lease when the accident happened. Culver's truck was empty at the time of the accident. Riechmann possessed no interest in the revenue to be earned from the trip lease as that was an enterprise solely to benefit Hamel and Culver. Despite the fact

that Riechmann had no interest in this prospective load, Culver continued to display the Riechmann decals on the truck while enroute.

Grinnell had issued to Hamel an Illinois garage liability policy containing a special endorsement known as Automobile Hazard No. 1. Respondent Excalibur Insurance Company of Minnesota (Excalibur) had issued to Riechmann a policy of liability insurance.

The District Court, after entering an amended Order, determined that Grinnell insured both Hamel and Culver; that Culver was Hamel's agent; that Excalibur extended coverage only to Riechmann; that Riechmann possessed a vicarious liability to the public for Culver's negligence based upon ICC regulations; that Grinnell was secondarily "liable" and that neither Riechmann nor Hamel were entitled to indemnity from each other.

On appeal, the Eighth Circuit affirmed the District Court's finding that under Illinois law the Grinnell policy afforded coverage to Hamel and Culver for the accident. In its review of the issues of liability, the Eighth Circuit affirmed the District Court's finding that ICC regulations placed upon Riechmann a statutory liability to the public for the acts of Culver. The Eighth Circuit also observed that while the regulations may impose a liability to the public upon the ICC licensed lessor, they do not obviate either the liability of the negligent tortfeasor or that of his employer.

Having affirmed the liability of the various insureds, the Eighth Circuit proceeded to determine the priority of insurance coverages. By applying the applicable "other insurance" provisions of the Grinnell and Excalibur policies, the Eighth Circuit held that the coverages provided by Grinnell to Culver, Hamel and Riechmann were primary

to the loss and that Excalibur's coverage to Riechmann was excess. Petitioner does not challenge the Eighth Circuit's determination that the policy language makes its coverage primary and Excalibur's excess. The petitioner, Grinnell, was required to pay the incurred loss to the limit of its insurance coverage simply because it was the primary insurance carrier on the loss. In its essence this case is a garden variety insurance coverage dispute. The Eighth Circuit's opinion did not involve a controversial construction of the nature of an ICC carrier's statutory liability.

H. SUMMARY OF ARGUMENT

The issues presented for review lack overall national importance and were correctly decided by the court below after full consideration.

I. ARGUMENT AGAINST ALLOWANCE OF WRIT

1. The Eighth Circuit Correctly Applied State Law In Determining That Grinnell Extended Coverage To Hamel And Culver.

The issues of substantive insurance law for which review is sought present neither a federal question nor a constitutional issue. These issues are too narrow in scope and lack the national importance necessary to warrant review by this Court on certiorari. Furthermore, the issues were correctly decided. The Eighth Circuit's decision that the language of petitioner's insurance policy was ambiguous and thus extended coverage to Hamel and Culver is in accord with Illinois case law construing the identical policy provision. *Associated Indemnity Company vs. Insurance Company of North America*, 68 Ill. App. 807, 386 N.E.2d 529 (1979).

The Eighth Circuit's determination that the grant of coverage extended by petitioner's policy was not negated by an exclusionary clause is also well supported. *Wells vs. Allstate Insurance Company*, 327 F. Supp. 622 (D. S. Car. 1971); *Peterson vs. Marlowe*, 264 N.W. 2d 133 (Minn. 1977). These issues of insurance law are, in any case, state law issues and pose no issue of circuit conflict or of national importance.

2. The Eighth Circuit Was Correct In Determining That ICC Regulations Do Not Absolve A Tort Feasor From Liability.

Petitioner's assertion that the Eighth Circuit's decision is in conflict with decisions of this and other courts is based upon an apparently erroneous reading of the decision. The Eighth Circuit found that ICC regulations impose upon the ICC licensed carrier a vicarious liability for the negligent acts of petitioner's insured, Culver. Although not directly stated, the crux of the petition appears to be a claim that the statutory vicarious liability of the ICC carrier must be held to displace the liability of the negligent truck driver and his employer as determined under applicable state law theories of negligence and the doctrine of *respondeat superior*. This argument was deservedly rejected by the Eighth Circuit.

The Eighth Circuit's determination that the ICC regulations do not release a negligent tortfeasor from the consequence of his actions is consistent with the public policy behind the regulations and well established authority. The public policy of protecting the motoring public is satisfied by imposing a vicarious liability upon the regulated carrier who must demonstrate financial responsibility through the

procurement of insurance. It does not follow that the public carrier's statutory liability must exist in lieu of or even primary to, the established liability of the tortfeasor under state law. Eliminating or subordinating the liability of a negligent truck driver would endanger public safety on the highways and contravene the purpose of the ICC regulations by needlessly depriving the injured public of a source of recovery. Neither the Interstate Commerce Act nor the ICC regulations excuse Culver and Hamel from their respective liabilities or make those liabilities secondary to any vicarious liability Riechmann may have. *Carolina Casualty Company vs. Insurance Company of North America,* 595 F.2d 128 (3rd Cir. 1979); *Vance Trucking Company vs. Canal Insurance Company,* 249 F. Supp. 33 (D. S. Car. 1966), aff'd, 395 F.2d 391 (4th Cir. 1968), cert. denied, 393 U.S. 845 (1968); and *Simmons vs. King,* 478 F.2d 857 (5th Cir. 1973).

Petitioner's contention that the Eighth Circuit's holding is contrary to this court's opinion of *Transamerican Freight Lines, Inc. vs. Brada Miller Freight Systems, Inc.,* 423 U.S. 28, 96 S.Ct. 229, 46 L.Ed.2d 169 (1975) is incorrect. In *Brada Miller,* supra, this Court held that the ICC regulations did not prevent an ICC licensed carrier from receiving indemnity for any liability it derived from the regulations. In its discussion, this Court specifically noted that the regulations were not offended by making a negligent lessor bear the burden of its own negligence.

Likewise, petitioner's assertion that the Eighth Circuit's holding is in conflict with decisions of other circuits is unsupportable. There are no federal circuit court opinions holding that the ICC regulations absolve a negligent tortfeasor of his responsibility because of the separate vicarious

responsibility placed upon an ICC carrier. Petitioner fails to cite any authority attesting to this asserted conflict. The notion that the statutory liability of an ICC carrier is exclusive (the "sole" liability) is singular to petitioner and in direct contradiction with *Brada Miller*. Even if this singular notion was adjudged as law, Grinnell's determined liability would not be altered since it was Riechmann's primary insurance carrier: "We find Grinnell's garage liability policy applicable as providing primary coverage for the July 19th accident; to the extent of its policy limits, Grinnell must reimburse Excalibur for sums paid out under the judgments and the settlement of the Youngren claims; . . ." 722 F.2d 1406 (8th Cir. 1983).

J. CONCLUSION

This case is not one of national significance. The issues of substantive state insurance law are restricted to a narrow area of insurance practice and present neither a federal question nor a constitutional issue. Those issues, together with questions concerning ICC regulations, were fully considered by the Court below and correctly decided in accord with well established authority. This case does not merit the attention of this Court.

Dated: April 1, 1984.

Respectfully submitted,

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IN THE UNITED STATES SUPREME COURT

SPRING TERM
CASE NO. 83-1586

GRINNELL MUTUAL REINSURANCE COMPANY,
AN IOWA CORPORATION,

PETITIONER,

vs.

EMPIRE FIRE & MARINE INSURANCE COMPANY,
A NEBRASKA CORPORATION, ET AL,

RESPONDENTS.

= =

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

= =

PETITIONER'S REPLY BRIEF

= =

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April 1984

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No. 83-1586

In The
SUPREME COURT OF THE UNITED STATES
Spring Term, 1984

Grinnell Mutual Reinsurance Company, an Iowa Corporation,
Petitioner,

-vs-

Empire Fire & Marine Insurance Company, a Nebraska Corporation, et al,
Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS REPLY BRIEF

STATEMENT OF CASE

Respondents' state that this Petitioner does not challenge the Eighth Circuit's determination that the policy language makes its coverage primary and Excalibur's excess. (Respondents' brief, page 4). This statement is not correct. (See Petitioner's brief, page ii, issue II and pages 9 and 10). This is an important issue that is hotly disputed and has been in dispute throughout the litigation.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I.

THE EIGHTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION OF TRANSAMERICA FREIGHT SYSTEMS, INC. V BRADA MILLER FREIGHT SYSTEMS, INC., 423 U.S. 28.

Respondents Riechmann and Excalibur argue the Eighth Circuit's Decision that a public carrier's statutory duty to the public, under ICC regulations, is secondary to a primary duty that can be superimposed by the law of a state is correct. By implication they argue the Eighth Circuit was correct when it used Illinois common law to find that driver Culver was the employee of Hamel, the owner, and Hamel were primarily responsible to the public, not Riechmann, the common carrier and lessee of the transport driver Culver was operating. (See Respondents' brief at 6 and the Eighth Circuit's Decision 722 F2d 1400, 1405).

The Eighth Circuit's Decision is in direct conflict with this court's decision of Transamerica Freight Lines, Inc., 423 U.S. 28. Justice Blackmun in his opinion at pp. 35-36 states that while leasing is permitted, the primary control of the leased transport under ICC regulations is with the common carrier lessee, not the owner. It is the lessee who owes the primary duty to the public.

It can be readily seen that if the Eighth Circuit's decision is allowed to stand, it does in effect overrule this court's Brada Miller decision. It would return the entire interstate trucking industry to the many problems prior to Brada Miller, supra, as outlined by Justice Blackmun at 423 U.S. 37 of his opinion. Indeed, this case assumes national importance and the need for a writ can readily be seen.

II.

THE EIGHTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THE SUBSTANTIVE LAW OF ILLINOIS AND ONE OF ITS OWN PRIOR DECISIONS.

Respondents Riechmann and Excalibur argue that we asserted in our petition that the Eighth Circuit's Decision was in conflict with Decisions of other circuits. (See Respondents' brief at page 6).

Respondents are in error. We argued that the Eighth Circuit's Decision was in conflict with this court's Brada Miller decision, supra, and two Illinois cases: Schedler v Rowley Interstate Transp. Co., 368 NE2d 128 (Ill. 1977) and Krieder Truck Service, Inc. v Augustine, 304 NE2d 1179 (Ill. 1979) and the Eighth Circuit's own prior decision of Wellman v Liberty Mutual Insurance Co., 496 F2d 131 (8th Cir. 1974). (See Petitioner's brief at page 8).

In Krieder, supra, the Supreme Court of Illinois held in compliance with Brada Miller that so long as the ICC lease was in effect (as was true in our case), it would follow Schedler, supra, and troublesome agency and independent contractor questions need not be determined and that court held the interstate carrier liable to the public because the ICC lease was in effect. The Eighth Circuit, in its Decision, entirely either overlooked or ignored this Decision. The Circuit applied Illinois common law despite these two Illinois Decisions.

Again, this case assumes national importance in the sense that it returns the interstate trucking industry to all the difficulties that it encountered prior to Brada Miller, supra.

III.

THE EIGHTH CIRCUIT'S DECISION NEGATING THE PETITIONER'S EXCLUSIONARY CLAUSE IS IN DIRECT CONFLICT WITH ILLINOIS LAW AND IN CONFLICT WITH ERIE V TOMPKINS.

Riechmann and Excalibur argue the Eighth Circuit's Decision is correct and cites two Decisions: a 1971 South Carolina Federal District Court and a 1977 Minnesota Supreme Court decision.

In an almost identical fact question to this case in St. Paul Fire & Marine Ins. Co. v Frankurt, 69 Ill. 2d 209, 370, NE2d 1058, 1061, 1062, that court held where an ICC lease existed that a rental exclusion very similar to the exclusion in the Petitioner's policy was valid even though the transport was empty and driven by the owner on the owner's business when the accident occurred.

Again, this case is in direct conflict with this court's Erie R. Co. v Tompkins, 304 U.S. 64 (1937). If the Eighth Circuit's Decision is allowed to stand, it will impose federal common-law where the law of Illinois should prevail. It will create confusion and uncertainty throughout the insurance industry.

CONCLUSION

This case is one of national importance because:

First, the Eighth Circuit's Decision is in conflict with this court's Transamerica Freight Systems, Inc., supra, on the basic and vital issue of control over a transport used in interstate commerce;

Second, the Decision is in direct conflict with the substantive law of Illinois on control over a transport engaged in interstate commerce;

Third, the Decision is in direct conflict with the substantive law of Illinois on the rental exclusion contained in the petitioner's policy and, hence, violates this court's Erie R. Co. v Tompkins Decision.

Respectfully submitted,

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